92-1956

No. _____

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In The

Supreme Court of the United States

October Term, 1992

CONSOLIDATED RAIL CORPORATION,

Petitioner,

v.

JAMES E. GOTTSHALL *and* ALAN CARLISLE,

Respondents.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

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APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1926

JAMES E. GOTTSHALL,

Appellant,

v.

CONSOLIDATED RAIL CORPORATION,

Appellee.

Appeal From The United States
District Court For The
Eastern District Of Pennsylvania
(D.C. Civil Action No. 89-3102)

Argued: May 7, 1992
Before: BECKER, NYGAARD,
and ROTH, *Circuit Judges.*
(Filed: February 8, 1993)

OPINION OF THE COURT

NYGAARD, Circuit Judge.

James E. Gottshall appeals from a summary judgment in favor of Consolidated Rail Corporation in this action under the Federal Employers' Liability Act (FELA), 45 U.S.C. § 51 et seq. In the context of the facts that follow, we will examine whether FELA recognizes negligent infliction of emotional distress as a basis for liability, and if so, define the contours of this liability. We will construe

the facts in the light most favorable to Gottshall. *Metzger v. Osbeck*, 841 F.2d 518, 519 (3d Cir.1988). We hold that Gottshall has shown a sufficient basis to sustain his suit under FELA. Conrail is not entitled to judgment as a matter of law, and we will reverse and remand for further proceedings.

I.

On an exceedingly hot and humid August day during the summer of 1988, Conrail dispatched a work gang of nine men and among them were James Gottshall and his friend Richard Johns. The crew was supervised by Michael Norvick. Conrail sent its men to replace a stretch of defective tracks on the Watertown Secondary near Turbotville, Pennsylvania. Despite many technological advances in the railway industry, replacing steel rails still requires raw human labor. It remains heavy, strenuous work, requiring workers to unload, carry, saw, and drill holes in steel rails, and to extract spikes. Because trains were operating on the track, work did not begin until high noon when the temperature had exceeded 95 degrees. The temperature of the rail itself was 118 degrees. The track was out in the flats – in the open.

Most of the men were in their fifties and many were overweight. Conrail knew that one worker had suffered a serious heart attack. It also knew Johns was overweight, had high blood pressure and athero or arteriosclerotic cardiovascular disease, and was taking medication.

Conrail was on a strict time schedule because, as Gottshall explained, it had violated a railway safety regulation and knew it was scheduled for a safety inspection.

On this particular day Conrail drove its men hard; the pace of the work was unusually fast. Although conditions became increasingly inhospitable, the men were discouraged repeatedly from taking rest breaks except to get water on a need basis. As a practical matter it was difficult for workers to take unscheduled breaks because they often worked in teams. As Norvick stated, "We aren't going to stop our maintenance work because of the heat."

Under these stark conditions the men worked continuously for about two and a half hours until the work routine was unexpectedly disrupted. While Johns was cutting a rail, Gottshall saw him collapse. Gottshall and several men rushed to help their coworker. Norvick saw that Johns was pale and sweating profusely and realized he was having trouble with the weather conditions. They administered a cold compress and soon Johns regained consciousness. Ever aware of the time constraints on the work to be done, Norvick ordered the men to stop assisting Johns and to get back to work. They did so, leaving Johns with Norvick who neither took Johns from the worksite nor sought medical assistance. Five minutes later, Gottshall saw Johns stand up and collapse again.

Gottshall rushed to help his friend and saw that Johns was in trouble. Johns had turned white; his teeth had been knocked out by the fall; his eyes were rolled back; he was gasping for breath; his heart was fluttering; and saliva was drooling from his mouth. Gottshall realized Johns was suffering from a heart attack and began cardiopulmonary resuscitation. At one point Gottshall managed to restart Johns' heart, but only briefly. Although Gottshall was emotionally perturbed, and at

times crying, he continued the cardiac procedure for about forty minutes while waiting for medical help.

This time Norvick realized Johns needed medical help immediately. The men had communication equipment, but that equipment was useless because on this particular day Conrail had taken the Turbotville base station off the air for repairs without notifying the men. Norvick was forced to physically seek help.

Rather than take the dying Johns to the nearest town, Norvick sped along an old country road to a firehall, only to find it closed. Sometime after the initial attempted distress call, the radio equipment apparently became operational and Norvick managed to reach a Conrail dispatcher. Norvick then raced to Agway Feed to place a 911 emergency call just in case the dispatcher's lines would not work. The worksite was isolated, so Norvick arranged to meet the medical help at a nearby road. When the paramedics arrived some thirty minutes to an hour later, he led them through a path to the worksite.

By this time, it was too late. Johns had died. His corpse was covered and laid on the gravel beside the track where it remained in the open, under the hot sun and in full view of the men until the coroner arrived, some three hours later. Meanwhile, Norvick ordered the men back to work because an empty coal train needed to use the railway line. When the men finished the work, Norvick ordered Gottshall and the others to stay at the worksite.

After the coroner finished, Gottshall and several men carried Johns' body to the ambulance parked in the distance. The coroner reported that Johns had died from a

heart attack, precipitated by the excessive heat and humidity, combined with the heavy physical exertion. He also found that Johns did not receive prompt medical attention and that, had he, his chances of survival would have been significantly enhanced.

From the outset, the incident hit Gottshall hard. Other workers noticed he was emotional and upset during the ordeal. While he was giving CPR to Johns, he kept repeating, "Come on Dick, breathe, breathe." Even as the work crew returned from the worksite hours after Johns had died, a worker noticed Gottshall was still crying.

Johns was Gottshall's friend, and their friendship went beyond work. Johns often visited Gottshall to socialize. They spent time on the weekends, socializing and discussing the railway industry. Johns planned to join the National Historical Society of which Gottshall is a member. They attended union meetings, worked and took their meals together, and sometimes went drinking together. They had enjoyed this relationship for fifteen years. Conrail knew they were "personal friends."

When Gottshall returned to work the next morning, a Conrail supervisor reprimanded him for administering CPR to Johns. Otherwise, it was work as usual. The extreme weather conditions persisted. The men went back to the track and continued to work long, hard hours under the sun. Conrail did not implement scheduled breaks but water, as usual, was provided.

Gottshall began to feel sick and lost his appetite. He became preoccupied with the events surrounding Johns' death, and he became increasingly afraid that he would die under the same extreme conditions.

Johns' funeral was held the following weekend. The following Tuesday, Gottshall told his supervisor he was sick and was going home. The supervisor told him that he had to explain to the division engineer. As Gottshall recalled, "I had to explain to him after all of this heat and exhaustion, I'm getting sick and I can't take it, I'm going home and taking a couple of days off, and I just got sick and just couldn't go back anymore."

He returned home, retreated to his basement, and stayed there until his father found him several days later. Gottshall, along with the others who witnessed the accident, underwent a stress test given by their local union. The results indicated that the general consensus among the men was that the death was avoidable and that the men exhibited considerable depression and rage towards Conrail. The test identified Gottshall as suffering the most and recommended he seek medical treatment.

Gottshall was admitted to the Northwestern Institute of Psychiatry and remained there under the care of Dr. Byron Braid for about three weeks. Doctor Braid diagnosed that Gottshall was suffering from major depression and post-traumatic stress disorder. Gottshall was having suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares of the death scene and a fear of leaving home. During this time Gottshall lost forty pounds. Another psychiatrist, Dr. Gary Glass, and a clinical psychologist, Dr. Sharon Silberman, confirmed Dr. Braid's diagnosis. Since his discharge from the hospital, Gottshall has continued to receive out-patient psychological treatment.

Gottshall brought an action against Conrail under FELA, 45 U.S.C. § 51 et seq., seeking damages for emotional and physical injuries suffered and alleging that Conrail's negligence created the circumstances under which he was forced to watch and participate in the events surrounding the death of his friend. The district court reasoned that Gottshall's allegations failed to satisfy the elements of any of the recognized common law theories of liability, including the bystander and the zone of danger tests. *Gottshall v. Consolidated Rail Corp*, 773 F.Supp. 778, 781 (E.D.Pa.1991). It further reasoned that Conrail did not breach a general duty of care because it considered the failure to provide means of communication the only possible conduct breaching that duty and that Conrail could not have reasonably foreseen that such conduct would lead to Gottshall's injuries. Last, it applied the causation standard under Pennsylvania law and concluded that "Gottshall's injury was just too far down the causal chain, and as a result linking defendant's negligence to the harm treats the defendant like an insurer." *Id.* at 784. For these reasons the district court granted Conrail's motion for summary judgment, and Gottshall appeals, contending he is entitled to a trial on the merits under FELA.

II.

FELA creates a cause of action for railway employees who have been killed or injured by the railway's negligence. It provides:

> Every common carrier . . . shall be liable in damages to any person suffering *injury* while he is employed by such carrier . . . for such injury

> or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence. . . .

45 U.S.C. § 51 (emphasis added). The statute nowhere draws a distinction between claims for physical or emotional injury.

In *Atchison, Topeka & Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), the Supreme Court addressed whether negligent infliction of an emotional injury is actionable under FELA. The employee there brought a FELA action alleging that the railroad harassed, threatened and intimidated him and that as a result he suffered "a mental breakdown, and certain associated physical disorders." The Court first held that an employee retains his right to bring a FELA action for damages even though the injury was caused by conduct possibly subject to arbitration under the Railway Labor Act. 480 U.S. at 565-69, 107 S.Ct. at 1416-17. The Court then turned to the railway's contention that an employee's "wholly mental injury" was not compensable under FELA. It declined to resolve this issue, noting that the record was incomplete as to the exact nature of the allegedly tortious activity and the extent of the injuries allegedly suffered. It opined that "broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* 480 U.S. at 570, 107 S.Ct. at 1418. Thus federal courts are left to develop the degree to which negligent infliction of emotional distress is actionable under FELA.

The *Buell* Court said, however, that federal courts should "glean [ ] guidance from common-law developments." *Id.* 480 U.S. at 568, 107 S.Ct. at 1417. So, we first look to the common law. In seeking guidance we are not limited to the law of the forum state, but instead must gauge the development of the common law from a broader base. *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 77 (3d Cir.1991).

A.

Among states, a majority recognizes a cause of action in tort for negligent infliction of emotional distress. See *Buell*, 480 U.S. at 569-71 & n. 20, 107 S.Ct. at 1418 & n. 20. But from recognition to application, the doctrinal divergence is great.

A minority employs the "physical impact" rule.[1] The rule requires a contemporaneous physical injury or impact to recover for negligent infliction of emotional distress. "[T]he purpose of the rule requiring physical impact is to prevent 'illusory or imaginative or faked' claims." *Zelinsky v. Chimics*, 196 Pa.Super. 312, 318, 175 A.2d 351, 354 (1961). See Restatement (Second) of Torts, § 436A, comment b (1965).

A large majority of jurisdictions employs either the "zone of danger" or "physical manifestation" rules. See

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[1] See Comment, *Negligent Infliction of Mental Distress: A Jurisdictional Survey of Existing Limitations Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill.L.Rev. 781, 792-93 n. 59 (1988) (as of 1988 five states plus the District of Columbia have adopted this rule).

supra n. 1, Comment, 33 Vill.L.Rev. at 796-98 & n. 91; Restatement §§ 313, 436, 436A. The zone of danger rule permits recovery for emotional injuries resulting from witnessing physical harm to another or from fearing physical harm to oneself, provided that plaintiff was actually threatened by physical harm. The physical manifestation rule requires that plaintiff exhibit a physical injury or symptom as the direct and natural result of the initial emotional distress suffered.

Many jurisdictions also permit a bystander to recover for emotional injuries. The quintessential common law case involves the mother who witnesses the death of her child. See *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968) (en banc). See generally Comment, 33 Vill.L.Rev. at 806-07 n. 139 (as of 1988 at least ten states have adopted the *Dillon* approach). The Supreme Court of California restated the *Dillon* bystander test as this: Plaintiff can recover if she (1) is present at the accident scene at the time it occurs and contemporaneously perceives the injury to the victim, (2) suffers serious emotional distress as a result of watching the injury, and (3) is closely related to the injured victim. *Thing v. La Chusa*, 48 Cal.3d 644, 668-69, 257 Cal.Rptr. 865, 771 P.2d 814 (1989). As for the last factor, the court limited recovery to relatives residing in the same household, parents, siblings, children, and grandparents of the victim. 257 Cal.Rptr. at 880 n. 10, 771 P.2d at 829 n. 10.

While some jurisdictions require that the plaintiff and the victim stand in some familial relationship, others seem to suggest a showing of strong emotional ties will suffice. See *Champion v. Gray*, 420 So.2d 348, 353 (Fla.App.1982), "decision quashed" 478 So.2d 17, 20

(Fla.1985); *Versland v. Caron Transp.*, 206 Mont. 313, 671 P.2d 583, 587 (1983); *Paugh v. Hanks*, 6 Ohio St.3d 72, 79-80, 451 N.E.2d 759, 766-67 (1983); *Leong v. Takasaki*, 55 Haw. 398, 520 P.2d 758 (1974); *Hunsley v. Giard*, 87 Wash.2d 424, 553 P.2d 1096, 1103 (1976); *Toms v. McConnell*, 45 Mich.App. 647, 207 N.W.2d 140, 144-45 (1973); *Keck v. Jackson*, 122 Ariz. 114, 593 P.2d 668, 670 (1979). Thus a plaintiff must show physical, temporal, and relational proximity.

Although these common law tests seem as different as they are arbitrary, and have been so criticized, they share common roots. While severe emotional injuries can be just as debilitating as physical injuries, they are not as manifest. One can see frayed skin, but one cannot see frayed nerves; hence, an emotional injury is easier to fake. These tests therefore have been judicially developed to screen causes of action and send only the meritorious ones to juries.

As an unfortunate product of this thinking, the focus shifted from traditional principles of liability to mechanical adherence to these tests, which are based upon a theory that liability is the extraordinary exception. Thus, even in cases of gross negligence resulting in reasonably foreseeable injuries, common law courts preserve the limits of the established rules, thereby precluding recovery for many meritorious claims.[2]

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[2] See for example, *District of Columbia v. Smith*, 436 A.2d 1294 (D.C.1981) (negligent failure to inform next of kin about death of loved one is noncompensable absent physical impact); *Woodman v. Dever*, 367 So.2d 1061 (Fla.Dist.Ct.App.1979) (a child who witnessed robbery and sexual assault of mother was

B.

These common law tests provide instruments that are intended to separate the meritorious claims from the others, but they do not necessarily etch the contours of the federal right. While we assume that "FELA jurisprudence gleans guidance from common-law developments," *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417 (citing *Urie v. Thompson*, 337 U.S. 163, 172-74, 69 S.Ct. 1018, 1026, 93 L.Ed. 1282 (1949)), we are not called upon to resolve matters of state law, nor predict how state courts would resolve them. Cf. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78, 58 S.Ct. 817, 822, 82 L.Ed. 1188 (1938); *Robertson v. Allied Signal, Inc.*, 914 F.2d 360, 364 (3d Cir.1990). Determining FELA liability is distinctly a federal question. *Urie*, 337 U.S. at 174-78, 69 S.Ct. at 1027-28.

While federal courts uniformly agree that claims for negligent infliction of emotional distress are cognizable under FELA, they are badly splintered as to the elements necessary to bring such a claim.

The Court of Appeals for the Seventh Circuit has held that FELA does not create a cause of action for emotional injuries absent actual or threatened physical impact. *Ray v. Consolidated Rail Corp.*, 938 F.2d 704, 705 (7th Cir.1991) (quoting *Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir.1985) (pre-Buell case) ("the critical question in this case is simply whether [plaintiff]

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denied recovery because there was no physical impact on the child); *James v. Harris*, 729 P.2d 986 (Colo.Ct.App.1986) (parents who witnessed their child being run over by a car could not recover because they were not within the zone of danger).

has stated a claim under the FELA, which means a claim for a violation of one of the traditional 'physical' torts, such as assault, battery, and negligent infliction of personal injury, all of which are torts actionable under the [FELA]")). Accord *Hammond v. Terminal R.R. Ass'n*, 848 F.2d 95, 98 (7th Cir.1988); *Gillman v. Burlington N. R.R. Co.*, 878 F.2d 1020, 1025 (7th Cir.1989).

The Court of Appeals for the Ninth Circuit has taken the position that purely emotional injuries are compensable under FELA, though it has yet to delineate the circumstances in which recovery is permitted. *Taylor v. Burlington N. R.R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986) (pre-Buell case). See *Pierce v. Southern Pacific Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir.1987) (applying the "egg-shell plaintiff" doctrine to emotional claims if injury results in physical manifestation, in this case a heart attack).

The Court of Appeals for the Sixth Circuit has decided that FELA does not recognize a claim for *intentional* infliction of emotional distress resulting in purely emotional injuries. *Adkins v. Seaboard Sys. R.R.*, 821 F.2d 340, 342 (6th Cir.1987). It has yet to decide whether a claim for negligent infliction of emotional distress without verifiable physical manifestation is actionable. See *Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425, 426 (6th Cir.1988); *Adams v. CSX Transp., Inc.*, 899 F.2d 536, 539 (6th Cir.1990). But in *Stoklosa* and *Adams*, the court took two potentially contradictory views of an employer's duty to its employees to provide an "emotionally safe" workplace.

In *Stoklosa* the court concluded that an employer's duty is defined by whether its conduct could be reasonably foreseen to cause an employee's emotional distress. 864 F.2d at 426. In *Adams*, however, the court concluded that "an employer has not breached its duty to provide an emotionally safe workplace unless the employer (acting through its agents) engages in 'unconscionable abuse' of an employee." 899 F.2d at 540.[3]

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[3] We believe that the logic in *Adams* is flawed. By requiring "unconscionable abuse" as a prerequisite for recovery for purely emotional injury, the court relied on *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) and footnote 13 in *Buell*. But *Netto* involved a claim for intentional infliction of emotional distress, 863 F.2d at 1214 n. 4, while the claim in *Adams* involved negligent infliction of emotional distress. This distinction is critical. Footnote 13 in *Buell* addressed the railway's contention that if claims for emotional injuries are cognizable under FELA, no employee will pursue grievance through the Railway Labor Act since every aggrieved worker will undoubtedly have suffered some degree of emotional anguish. The Court responded:

> This parade of horribles mistakenly assumes that a significant percentage of employees bringing grievances suffer the type of severe emotional injury that has generally been required to establish liability for purely emotional injury, and that a significant percentage of employees are subject to the type of *unconscionable abuse* which is prerequisite to recovery. In *Farmer v. Carpenters*, 430 U.S. 290, 97 S.Ct. 1056, 51 L.Ed.2d 338 (1977), we held that a state action for *intentional infliction* of emotional distress was not pre-empted by the National Labor Relations Act (NLRA), and pointed out that the risk of interference with the NLRA was minimized by the fact that state law permitted "recovery only for emotional distress sustained as a result of 'outrageous' conduct."

480 U.S. at 567 n. 13, 107 S.Ct. at 1416 n. 13 (emphasis added). The Court here was discussing a claim for intentional infliction

The Court of Appeals for the Fourth Circuit requires plaintiff to show outrageous conduct as a predicate to a claim for negligent infliction of emotional distress under

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of emotional distress. Such claims require unconscionable or outrageous action. See William Prosser, The Law of Torts, § 12, at 60-65 (5th ed. 1984); Restatement § 46; *Womack v. Eldridge*, 215 Va. 338, 342, 210 S.E.2d 145, 148 (1974); *Fischer v. Maloney*, 43 N.Y.2d 553, 557, 402 N.Y.S.2d 991, 992-93, 373 N.E.2d 1215, 1217 (1978). Indeed the Court proceeded to distinguish claims for negligent and intentional infliction of emotional distress, concluding:

> [W]hether one can recover for emotional injury might rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity. . . . In short, the question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

480 U.S. at 569-70, 107 S.Ct. at 1417-18. Thus the Court did not intend to make unconscionable conduct a prerequisite for bringing a claim for emotional distress.

We fail to see why unconscionable conduct is required to bring a claim for *negligent* infliction of emotional distress. Even common law does not require it. See *Brown v. Cadillac Motor Car Div.*, 468 So.2d 903, 904 (Fla.1985); *Rickey v. Chicago Transit Auth.*, 98 Ill.2d 546, 550, 75 Ill.Dec. 211, 457 N.E.2d 1 (1983). Indeed, requiring outrageous conduct is logically inconsistent with the statute. The language of FELA refers to negligence only. The statutory language, however, has been extended to include liability for some intentional torts. See *Jamison v. Encarnacion*, 281 U.S. 635, 641, 50 S.Ct. 440, 442, 74 L.Ed. 1082 (1930). In this context, we find it odd that coverage is provided in an intentional tort, yet excluded when the injury arises out of negligence, specifically referred to in the statute, just because the plaintiff suffered an emotional injury.

FELA, thus taking the same position as the Sixth Circuit *Adams* court. *Elliott v. Norfolk & W. Ry. Co.*, 910 F.2d 1224, 1229 (4th Cir.1990) (citing *Buell*, 480 U.S. at 565-67 n. 13, 107 S.Ct. at 1416 n. 13; *Netto*, 863 F.2d at 1214-15). It declined to decide whether one may recover under FELA for purely emotional injuries without additional physical symptoms. *Id.*

The Court of Appeals for the First Circuit understands *Buell* as "an attempt to leave the door to recovery for wholly emotional injury somewhat ajar but not by any means wide open." *Moody v. Maine Cent. R.R. Co.*, 823 F.2d 693, 694 (1st Cir.1987). The court declined "to make this a pioneer case exploring the frontier possibility opened up by *Buell*" and rejected plaintiff's claim because he failed to show causation between the alleged injury and the tortious conduct. *Id.* at 694, 696. Likewise, in *Robert v. Consolidated Rail Corp.*, 832 F.2d 3 (1st Cir.1987), the court avoided the issue and held that plaintiff failed to establish that Conrail could have reasonably foreseen that he would suffer a heart attack from stress of which Conrail was never informed. It declined to resolve whether a heart attack induced solely by stress and not accompanied by any precipitating physical injury is a compensable injury. *Id.* at 7. But see *Pierce*, 823 F.2d at 1372 n. 2 (emotional distress leading to heart attack is actionable under FELA).

The Court of Appeals for the Fifth Circuit has decided a series of cases on this issue. In *Hagerty v. L & L Marine Serv., Inc.*, 788 F.2d 315 (5th Cir.1986) (pre-*Buell* case), plaintiff was drenched with toxic, carcinogenic chemicals and suffered emotional injuries arising from cancerphobia. The court concluded that FELA allows plaintiffs to recover for psychic and emotional harm because it was intended to provide broad coverage for all work-related "injuries" whether characterized as physical or mental. *Id.* at 318. On reconsideration, the court modified *Hagerty*, stating that a plaintiff may recover for serious mental distress assuming an "actionable injury." 797 F.2d 256 (1986).

In *Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) the court declined to decide whether a plaintiff may recover for purely emotional injuries under FELA because he had failed to show any evidence of unconscionable or outrageous conduct. *Id.* at 1214. While the Sixth Circuit position in *Adams* and the Fourth Circuit position in *Elliott* purportedly adopted the *Netto* holding, it is clear *Netto* is of a different genre because the court emphasized that the claim was only for intentional infliction of emotional distress. *Id.* at 1214 n. 4. The *Netto* court did not require unconscionable conduct for all claims for emotional distress. Rather, since it was presented with a claim based on intentional infliction of emotional distress only, it had no occasion to discuss negligent infliction of emotional distress. See supra n. 2.

In *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989), a seaman saw his half-brother crushed to death

and sued under the Jones Act.[4] The facts indicate that plaintiff, in some capacity, was not merely a witness, but was an active participant in the events: "Gaston [plaintiff] fell to the deck; but James [victim] slipped between the barge and the vessel and was crushed to death, despite Gaston's efforts to pull him to safety." *Id.* at 817. The court refused to provide recovery for an emotional injury stemming from witnessing the violent death of a relative, reasoning that the plaintiff's injury was the result of watching another person die and was not a result of fear for his own safety. It thus rejected the bystander rule of liability and required that plaintiff be in the zone of danger to recover for emotional distress. *Id.* at 819 (restricting *Hagerty* as a "physical impact" case). The court left open the question whether a purely emotional injury is cognizable. *Id.* at 821.

In *Wilson v. Zapata Off-Shore Co.*, 939 F.2d 260 (5th Cir.1991), the plaintiff sued under the Jones Act for emotional harm suffered as a result of sexual harassment. The evidence showed that the plaintiff was subjected to tortious physical contact and that she suffered physical manifestations of harm, including weight loss, vomiting, and diarrhea. *Id.* at 265. The court held that in these circumstances the plaintiff's claim was cognizable under the Jones Act. The court did not reach the issue of whether a purely emotional injury would be cognizable. *Id.* at 266 n. 8.

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[4] The Jones Act incorporates FELA. 46 U.S.C. § 688; *Ferguson v. Moore-McCormack Lines, Inc.*, 352 U.S. 521, 523, 77 S.Ct. 457, 458, 1 L.Ed.2d 511 (1957).

In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991), the plaintiff, a tug boat captain with over 30 years experience, witnessed an explosion when a barge ruptured a pipeline. He helped to ease the emergency by moving several vessels to safety. No one was injured in the accident. Soon thereafter, he developed post-traumatic stress disorder and depression resulting from his belief that he could have been injured or killed. He sought to recover under the Jones Act for a purely emotional injury.

After thoroughly reviewing the case law and the different theories of recovery under common law, the court concluded that a plaintiff may recover if the injury resulted from a situation in which a reasonable person, normally constituted, would not be able to cope adequately with the mental distress arising from the circumstances. *Id.* at 1010. It reasoned "one who has suffered a significant emotional injury should not be denied recovery simply because the factual scenario does not satisfy some earlier-selected, fictitious method of authenticating the injury." *Id.* at 1011. The court stated in a broad stroke:

> Excepting our colleagues in the Ninth Circuit, our circuit brethren have indicated a reluctance to field the *Buell* pitch. We end that reluctance today, persuaded that an emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury. We therefore hold that a claim for an emotional injury caused by emotional distress negligently inflicted, even without an accompanying physical injury or physical contact, is cognizable under the FELA.

Id. at 1009. Because one would not expect an experienced seaman to have such emotional reactions to fires in the oilfield, the court concluded that the injury was not a reasonably foreseeable consequence and therefore the claim was not cognizable. Indeed, the treating psychiatrist testified that he was baffled by the plaintiff's reaction to the accident.

The Court of Appeals for the Fifth Circuit granted en banc rehearing. 954 F.2d 266 (1992). The en banc court agreed that the plaintiff's claim was not cognizable even under the most liberal theory of recovery. 966 F.2d 166 (1992). The court, however, concluded that the facts did not permit the court to decide whether a claim for purely emotional injuries is cognizable. It emphasized that *Gaston* continued to represent the law of the circuit. "The [*Gaston*] court recognized that a plaintiff suing for purely emotional injuries could recover if he also suffered physical injury. The court also determined that a bystander could not recover for merely witnessing harm to another where the plaintiff suffered no harm or threat of harm." *Id.* at 169. But the en banc court believed that *Gaston* left open the question whether a claim for purely emotional injury under a zone of danger theory is cognizable. *Id.*

It is clear that there are open conflicts among the circuits.[5] A review of the decisions in other circuits in the

[5] In view of these conflicts, Justices White and Thomas believe that "a uniform rule should be announced by this Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 914, 914, 116 L.Ed.2d 813 (1992) (dissenting from a denial of certiorari); *Carroll v. Consolidated Rail Corp.*, ___ U.S. ___, ___, 112 S.Ct. 916, 916, 116 L.Ed.2d 816 (1992) (same).

wake of *Buell* indicates that there is no common discernable principle, test, view or attitude.

The jurisprudence among the district courts is no more consistent. See for example, *Kiffe v. Neches-Gulf Marine, Inc.*, 709 F.Supp. 743, 745 (E.D.Tex.1989) (worker who witnessed death of coworker and who suffered purely emotional injuries failed to state a claim); *Welby v. Consolidated Rail Corp.*, 671 F.Supp. 1015, 1021 (M.D.Pa.1987) (heart attack suffered as a result of improper and unsafe working conditions was actionable); *Gillman v. Burlington N. R.R. Co.*, 673 F.Supp. 913, 917 (N.D.Ill.1987) (emotional distress claim is actionable only if it satisfies the zone of physical danger test), affirmed, 878 F.2d 1020 (7th Cir.1989); *Teague v. National R.R. Passenger Corp.*, 708 F.Supp. 1344, 1350 (D.Mass.1989) ("[T]his Court therefore rejects the *Gillman* approach to the extent that it permits recovery *only* if the 'zone of danger' test is satisfied. In addition to permitting recovery under such circumstances, the Court also adopts the common law majority rule that actual or threatened impact is unnecessary to a negligent infliction of claim under FELA and that objective symptomatology of the mental distress will suffice.") (emphasis in original); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135, 144 (S.D.N.Y.1987) (suicide as a result of harassment is actionable); *Amendola v. Kansas City S. Ry. Co.*, 699 F.Supp. 1401, 1411 (W.D.Mo.1988) (mental anguish resulting from fear of contracting asbestos-related diseases is not actionable absent manifestations of physical injury); *Masiello v. Metro-North Commuter R.R.*, 748 F.Supp. 199, 205 (S.D.N.Y.1990) (emotional distress with an accompanying physical manifestation is actionable); *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 291 (E.D.Pa.1991) (harassment resulting in purely emotional injuries is actionable).

C.

We have refused to designate a particular common law test as *the* test in this circuit, choosing instead to take an ad hoc approach that focuses more on the facts rather than rules of law. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), Holliday brought a FELA action against the railroad alleging that he was injured from the stress created when Conrail forced him to work on a job for which he claimed to have been unqualified. We held that the facts in the light most favorable to Holliday, considering the character of the allegedly tortious activity (putting him in a position for which he was unqualified) and the lack of physical impact on him, could not support a FELA claim. *Id.* at 427.

Holliday's claim was essentially for emotional injuries suffered from job stress. If an employee showing some possible negligence with psychological consequences will always present a jury question, even the most attenuated claims could be advanced. Because claims for negligent infliction of emotional distress are so fact-dependent, we declined to make broad pronouncements that could restrict future meritorious claims. We did not hold that there could not be a recovery for emotional injuries unless the plaintiff suffers a physical injury or unless there is an accident, as we did not need to reach these issues. We stressed that the allegedly tortious activity did not result in a physical injury to another party, which Holliday witnessed, or indeed injury to another party at all. In fact, there was no accident. Thus "our opinion is narrow." *Id.* at 426.

In *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3rd Cir.1991), Outten brought a FELA action for emotional injuries he sustained when he saw two railway cars were about to collide. There was a collision, but it took place a full mile away from Outten. Outten did not see the accident because he was running in the other direction and, like Holliday, no one was hurt. Outten failed to show how the railway breached a duty: He was neither a bystander who witnessed a closely-related person injured, see *Dillon v. Legg*, nor an active participant in the injury-causing event, see *Althoff v. Consolidated Rail Corp.*, 1988 WL 61734, 1988 U.S.Dist. Lexis 5343 (E.D.Pa.1988) (when a worker operated the instrumentality that killed a coworker, he became an "active participant" in the accident through the employer's negligence). There was thus no "solid basis in the present state of common law" to permit recovery. 928 F.2d at 79. Because the Supreme Court has cautioned us to finely scrutinize the facts of the case, we declined to devise a generally applicable litmus test for FELA claims based on negligent infliction of emotional distress.

The core of the problem lies in the fundamental tension between two conflicting policies. On the one hand, common law doctrines are built on the suspicion that emotional distress claims are subject to fraud and frivolity. In *Outten* we rejected the notion that FELA liability extends to emotional injuries suffered when an employee "reasonably feared personal physical injury," believing such a rule would remove reasonable limits on these types of claims. 928 F.2d at 79. And in *Holliday* we adopted the policy considerations set forth in *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090

(E.D.Pa.1989): a need to prevent incalculable and potentially unlimited damages, a flood of litigation, and fraud. 914 F.2d at 424.

On the other hand, contrasting the often harsh and arbitrary doctrines of the common law is the policy underlying FELA itself. FELA was enacted in broad, open-ended terms so that recovery will be liberally granted and that an employer's standard of conduct will be malleable, and adapt to the changing realities of industrial conditions and standards. While courts must be neither an instrument for the opportunistic con-artist nor an understanding shoulder for the emotionally frail, we must follow Congress' mandate. So we must reconcile the two policies, discerning the trends and developments in common law and then gauging them according to the policy underlying FELA, for FELA is at issue here and creates the cause of action.

D.

Congress promulgated FELA to provide recovery in meritorious cases and to remedy deficiencies in the common law. At common law the liability of the master to his servant was predicated on generally applicable tort laws. The road to liability was treacherous, requiring the servant to negotiate through various defenses designed to limit liability. This limited liability insulated fledgling industries, too weak to "bear[ ] the 'human overhead' which is an inevitable part of the cost – to someone – of the doing of industrialized business." *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 59, 63 S.Ct. 444, 447, 87 L.Ed. 610 (1943). As railways prospered and grew strong

and because workers lacked the economic and bargaining power to provide for their safety, the policy shifted to place the burden of the "human overhead" on the railway industry. *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 397-98, 2 L.Ed.2d 382 (1958). The statute considered the railway industry as a "unitary enterprise, its economic resources obligated to bear the burden of all injuries befalling those engaged in the enterprise arising out of the fault of any other member engaged in the common endeavor." *Sinkler v. Missouri Pacific R.R. Co.*, 356 U.S. 326, 330, 78 S.Ct. 758, 762, 2 L.Ed.2d 799 (1958). FELA therefore provides compensation for the fatalities and injuries the railway industry inevitably imposes. *Wilkerson v. McCarthy*, 336 U.S. 53, 68, 69 S.Ct. 413, 420, 93 L.Ed. 497 (1949) (Douglas concurring).

Although FELA is predicated on common law negligence principles, *Chesapeake & Ohio Ry. Co. v. Stapleton*, 279 U.S. 587, 589-90, 49 S.Ct. 442, 443, 73 L.Ed. 861 (1929), instead of a detailed statute codifying them Congress enacted the statute in general terms. See 45 U.S.C. § 51. Congress left the onus of fashioning remedies to the courts in a manner analogous to the development of common law tort remedies. *Kernan*, 355 U.S. at 431-33, 78 S.Ct. at 398. But it is clear that courts should liberally grant relief. And it is equally clear that "Congress did not intend to create a static remedy, but one which would be developed and *enlarged* to meet the changing conditions and changing concepts of industry's duty toward its workers." *Id.* (emphasis added). See *Coray v. Southern Pacific Co.*, 335 U.S. 520, 524, 69 S.Ct. 275, 277, 93 L.Ed. 208 (1949) ("Congress has thus for its own reasons imposed extraordinary safety obligations upon railroads

and has commanded that if a breach of these obligations contributes in part to an employee's death, the railroad must pay damages."); *Ries v. National R.R. Passenger Corp.*, 960 F.2d 1156, 1165 (3d Cir.1992) (concurrence) ("[FELA] ensures that a common carrier's duties include, and extend, the spectrum of common law standard of recovery.") (emphasis in original); *Ackley v. Chicago & N.W. Transp. Co.*, 820 F.2d 263, 267 (8th Cir.1987) ("duty to provide a reasonably safe place of work . . . is broader under the statute than a general duty of due care"). See also *Jamison*, 281 U.S. at 638-41, 50 S.Ct. at 442 (extending the scope of FELA liability to cover some intentional torts even though the language of the statute refers only to negligent conduct).

Thus many traditional impediments to recovery found in common law have been eradicated by FELA itself or by the courts following the intent and dictates of the Act. "A primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." *Buell*, 480 U.S. at 561, 107 S.Ct. at 1413. We see evidence of this in the statute. At common law the doctrines of contributory negligence and assumption of the risk produced harsh and unfair results, often barring recovery for the victim. But sections 53 and 54 of FELA respectively, limit the application of these defenses. At common law an at-will employee may be fired for any or no reason. See for example, *Geary v. United States Steel Corp.*, 456 Pa. 171, 319 A.2d 174, 176 n. 4 (1974). But section 60 prohibits an employer from blocking or otherwise regulating the free flow of information concerning a FELA matter, including prohibiting retaliatory discharge of an employee who

furnishes such information. And section 55 prohibits an employer from contracting to limit or otherwise regulating its FELA liability.

Some of the inequities the statute did not eradicate, the courts have. In *Rogers v. Missouri Pacific R.R. Co.*, 352 U.S. 500, 77 S.Ct. 443, 1 L.Ed.2d 493 (1957), the Court expounded upon the relationship between FELA and the common law:

> [FELA] was enacted because the Congress was dissatisfied with the common-law duty of the master to his servant. The statute supplants that duty with the far more drastic duty of paying damages for injury or death at work due in whole or in part to the employer's negligence. The employer is stripped of his common-law defenses and for practical purposes the inquiry in these cases today rarely presents more than the single question whether negligence of the employer played any part, however small, in the injury or death which is the subject of the suit.

352 U.S. at 507-08, 77 S.Ct. at 449. Thus the Court did away with the strict requirements of causation in common law and replaced it with the inquiry of "simply whether the proofs justify with reason the conclusion that employer negligence played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* 352 U.S. at 506, 77 S.Ct. at 448.

In *Kernan v. American Dredging Co.*, 355 U.S. 426, 78 S.Ct. 394, 2 L.Ed.2d 382 (1958) an employee was killed because the employer violated a regulation that required a navigation light to be at a certain height above the water to provide visibility for passing ships. Because the

light was too low, it ignited fumes and caused an explosion. The Supreme Court held that the violation constituted negligence per se under section 51.

Traditionally, common law limited the negligence per se doctrine to injuries the statute was designed to prevent. See Restatement § 286, Comment on Clause (c). The Court, however, rejected this common law limitation and concluded that FELA liability springs from the violation of statutory duty regardless of the common law limitation. 355 U.S. at 437-39, 78 S.Ct. at 401. The Court succinctly articulated the theory and purpose of FELA liability:

> The courts, in developing the FELA with a view to adjusting equitably between the worker and his corporate employer the risks inherent in the railroad industry, have plainly rejected many of the refined distinctions necessary in common-law tort doctrine for the purpose of allocating risks between persons who are more nearly on an equal footing as to financial capacity and ability to avoid the hazards involved. . . . [T]he theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault in whole or in part, causes injury, liability ensues.

Id. Because the worker and the railway employer do not stand on equal footing, and because railway employment remains dangerous, FELA was intended to adjust the equities. See *Sinkler*, 356 U.S. at 329-31, 78 S.Ct. at 762.

In *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), the Court allowed an employee to recover for silicosis, a lung disease, even though the

statute violated was designed to ensure an adequate auxiliary braking system and not to protect employees against silicosis. Again the Court disregarded common law limitations:

> To read into this all-inclusive wording [of FELA] a restriction as to the kinds of employees covered, the degree of negligence required, or the particular sorts of harms inflicted, would be contradictory to the wording, the remedial and humanitarian purpose, and the constant and established course of liberal construction of the Act followed by this court.

337 U.S. at 181-82, 69 S.Ct. at 1030. The Court again stressed that FELA creates the cause of action and that FELA grants relief for meritorious claims for injuries as a result of an employer's negligent conduct.

The *Buell* Court cited *Rogers* and *Urie* for the proposition that causation in a FELA action is a lenient inquiry and that FELA is to be given a liberal construction. 480 U.S. at 560-62 n. 8, 562-64, 107 S.Ct. at 1413 n. 8, 1414. The policies underscoring *Rogers*, *Kernan* and *Urie* – the humanitarian purpose of shifting the costs of "human overhead" to the railway industry – remain as vital today as then and do not change with the nature of the injury. See *Urie*, 337 U.S. at 181, 69 S.Ct. at 1030 ("The wording [of FELA] was not restrictive as to . . . the particular kind of injury resulting.").

While the long-standing fundamental elements of bringing a FELA action are traditional common law elements, *Robert*, 832 F.2d at 6, in many ways FELA is the antithesis of the common law. FELA imposes upon carriers a higher standard of conduct and has eliminated

many of the refined distinctions and restrictions that common law imposed to bar recovery (even on meritorious claims). FELA liability and common law liability are thus different. The inexorable conclusion is: State law tests are not the *sine qua non* for determining whether plaintiff has a cognizable FELA claim and doctrinal common law distinctions are to be discarded when they bar recovery on meritorious FELA claims.[6]

Although several courts of appeals have adopted to the letter or rejected one or more of the common law tests, we find it unnecessary, and indeed undesirable, to do so for as one district court astutely observed, such a solution leads to chaos: "the federal courts in the fifty states might produce as many as fifty versions of what should be unified federal law." *Teague*, 708 F.Supp. at 1348 n. 5. Cf. *Lancaster*, 773 F.2d at 813 (7th Cir.) (adopting the

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[6] See *Urie*, 337 U.S. at 174, 69 S.Ct. at 1027 ("What constitutes negligence for the statute's purpose is a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws for other purposes."); *id.* 337 U.S. at 196, 69 S.Ct. at 1038 (Frankfurter concurring) ("At the risk of wearisome reiteration it is relevant to say again that the common-law concept of negligence is an antiquated and uncivilized basis for working out rights and duties for disabilities and deaths inevitably due to the conduct of modern industry."); *Sinkler*, 356 U.S. at 329, 78 S.Ct. at 762 ("However, in interpreting the FELA, we need not depend upon common-law principles of liability. This statute [is] an avowed departure from the rules of the common law. . . . "); *Kernan*, 355 U.S. at 438, 78 S.Ct. at 401 ("[Courts have] plainly rejected many of the refined distinctions necessary in common-law tort doctrine. . . . "); *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359, 361, 72 S.Ct. 312, 314, 96 L.Ed. 398 (1952) ("State laws are not controlling in determining what the incidents of this federal right shall be.").

physical impact and zone of danger tests); *Gaston*, 866 F.2d at 819 (5th Cir.) (adopting the physical impact and zone of danger tests and rejecting the bystander test); *Netto*, 863 F.2d at 1214 (5th Cir.) (requiring unconscionable conduct for claims based on intentional infliction of emotional distress); *Adams*, 899 F.2d at 540 (6th Cir.) (requiring unconscionable conduct for claims based on negligent infliction of emotional distress); *Elliott*, 910 F.2d at 1229 (4th Cir.) (same). By focusing on these exceptions, courts have gone their separate ways while ignoring the one thing that should unite them – the broad remedial scope of FELA. And by strictly adhering to them, we would, as some common law courts have chosen to do, preclude a great number of meritorious claims.

As we have seen, the common law has developed many doctrines and elaborate rules when dealing with emotional harm claims. At the heart of all these doctrines and rules lies but one function, to glean the meritorious from the feigned and frivolous. See Restatement § 436 A, comment b. For example, the physical impact and zone of danger rules are based on the notion that a plaintiff who has been subjected to or threatened with the negligent force would be less likely to fake a claim and would likely suffer genuine and severe emotional injuries. See *Neff v. Lasso*, 382 Pa.Super. 487, 555 A.2d 1304, 1307 (1989); *Zelinsky*, 175 A.2d at 354. And the physical manifestation rule is based on the notion that physical symptoms of emotional distress show that the plaintiff "really" suffered an injury. *Payton v. Abbott Lab.*, 386 Mass. 540, 437 N.E.2d 171, 175 & n. 5 (1982). See *Molien v. Kaiser Foundation Hosp.*, 27 Cal.3d 916, 167 Cal.Rptr. 831, 838, 616 P.2d 813, 820 (1980) ("It supposedly serves to satisfy

the cynic that the claim of emotional distress is genuine."). The Supreme Court has long recognized that emotional distress and suffering are compensable under FELA, so long as that emotional distress can be objectively validated to a sufficient degree by a precipitating physical injury. *Erie R.R. Co. v. Collins*, 253 U.S. 77, 85, 40 S.Ct. 450, 453, 64 L.Ed. 790 (1920) (plaintiff's emotional distress, including "shame and humiliation" and "mental pain," is cognizable under FELA when validated by a physical mutilation and disfigurement), overruled on other grounds, *Chicago & E. Ill. R.R. Co. v. Industrial Comm'n*, 284 U.S. 296, 299, 52 S.Ct. 151, 152, 76 L.Ed. 304 (1932). See *East Ala. Express Co. v. Dupes*, 271 Ala. 504, 124 So.2d 809 (1960) (plaintiff who sustained whiplash and fracture allowed to recover for her "worry" about the future result of her injury). "The problem from this perspective is one of adequate proof, and it is not necessary to deny a remedy in all cases because some claims may be false." The Law of Torts, § 54, at 361.

That which distinguishes merit from fraud and frivolity most often depends on one issue – whether there was injury in fact reasonably attributable to the negligent conduct – for the law does not reward those who did not suffer injuries or whose injuries are trivial, or those who are faint of heart. See Restatement § 46 comment j. Dean Prosser suggests:

> It is entirely possible to allow recovery only upon satisfactory evidence and deny it when there is nothing to corroborate the claim, or to look for some guarantee of genuineness in the circumstances of the case.

* * *

> What all of these cases appear to have in common is an especial likelihood of genuine and serious mental distress, arising from the special circumstances, which serves as a guarantee that the claim is not spurious. There may perhaps be other such cases. Where the guarantee can be found, and the mental distress is undoubtedly real and serious, there may be no good reason to deny recovery.

The Law of Torts, § 54, at 361, 362. See *Johnson v. New York*, 37 N.Y.2d 378, 383-84, 372 N.Y.S.2d 638, 643, 334 N.E.2d 590, 593 (1975) ("recovery for emotional harm to one subjected directly to the tortious act may not be disallowed so long as the evidence is sufficient to show causation and substantiality of the harm suffered, together with a 'guarantee of genuineness' "); *Rodrigues v. State*, 52 Haw. 283, 52 Haw. 156, 472 P.2d 509, 520 ("the general standard of proof required to support a claim of mental distress is some guarantee of genuineness in the circumstances of the case"); Restatement § 436 A, comment b ("in the absence of the guarantee of genuineness provided by resulting bodily harm, such emotional disturbance may be too easily feigned"). Thus the contours of the common law rules of liability (and preclusion) can best be understood as encompassing, albeit crudely, only those special situations most likely to present a claim with sufficient indicia of genuineness. See The Law of Torts, § 54, at 360-66; *Hagerty*, 788 F.2d at 318.

But the guarantee is not fixed by the limited set of circumstances the common law has ordained. The common law tests provide only a dubious method for assuring that the injury is genuine. We find guidance in

Hagerty, where the Court of Appeals for the Fifth Circuit rejected the common law's doctrinal and definitional prerequisites for bringing an emotional distress claim:

> The physical injury requirement, like its counterpart, the physical impact requirement, was developed to provide courts with an objective means of ensuring that the alleged mental injury is not feigned. We believe that notion to be unrealistic. It is doubtful that the trier of fact is any less able to decide the fact or extent of mental suffering in the event of physical injury or impact. . . . The circumstances surrounding the fear-inducing occurrence may themselves supply sufficient indicia of genuineness. It is for the jury to decide questions such as the existence, severity and reasonableness of the fear.

788 F.2d at 318 (citation omitted). See *Ferrara v. Galluchio*, 5 N.Y.2d 16, 176 N.Y.S.2d 996, 999-1000, 152 N.E.2d 249, 252 (1958) (cancerphobia as a result of negligent X-ray treatment is actionable as the court found a "guarantee of genuineness [of the cancerphobia] in the circumstances of the case"); *Molien*, 616 P.2d at 821 (a false diagnosis of spouse having syphilis is sufficient to provide a guarantee of genuineness and allow recovery for a purely emotional injury). See also *Elden v. Sheldon*, 46 Cal.3d 267, 284, 250 Cal.Rptr. 254, 758 P.2d 582 (1988) (Broussard dissenting) ("In my view, recovery should not be cut off on arbitrary, definitional grounds but on functional grounds that correspond with real loss. As the commentators have suggested, the problem should be solved by the application of the principles of tort, not by the creation of exceptions to them.").

The solution is not found in rules of law so much as in an active scrutiny of the facts. The search for the guarantee is a fluid analysis, and it "is not necessarily an abstract point of law . . . that might be answerable without exacting scrutiny of the facts of the case." *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417. Although a fact-specific analysis may mean losing the comfort and security that bright-line, arbitrary rules afford, FELA jurisprudence cannot be reduced to a set of rules that mechanistically drive results without exacting scrutiny of the facts as they bear upon such considerations as the employer's duty to provide a safe workplace, the nature of the alleged tortious conduct, the injury, and the underlying equities. "[A]s Judge Becker noted in a very different context [ ] 'developing the law on a case-by-case basis and drawing lines depending on the facts is the stuff of judging.' " *Holliday*, 914 F.2d at 427 (citation omitted) (quoting *United States v. Balascsak*, 873 F.2d 673, 685 (3d Cir.1989) (concurrence)). See *Ries*, 960 F.2d at 1167 (concurrence) ("The development of FELA, like common law principles, should proceed on a case by case [basis]."). We implicitly recognized that we would not limit our inquiry to the common law rules of law when we adopted the "active participation" rule of liability explained in *Althoff*, for that rule does not fall within the parameters of any common law theory of liability. See *Outten*, 928 F.2d at 79.

III.

The issue is whether the factual circumstances here provide a threshold assurance that there is a likelihood of genuine and serious emotional injury. We look not to any specific fact or standard, but to the totality of the factors.

Thus, one consideration is whether plaintiff has a "solid basis in the present state of common law to permit him to recover." *Outten*, 928 F.2d at 79.

We first consider the common law bystander theory of recovery. Had Gottshall and Johns been father and son this would represent the classic common law claim. In some jurisdictions, courts have discarded the familial proximity element, recognizing its arbitrary character. In *Hunsley*, the Supreme Court of Washington commented, "We decline to draw an absolute boundary around the class of persons whose peril may stimulate the mental distress. This usually will be a jury question bearing on the reasonable reaction to the event unless the court can conclude as a matter of law that the reaction was unreasonable." 553 P.2d at 1103. Other courts have concluded similarly. See *Leong*, 520 P.2d 758 ("Neither should the absence of a blood relationship between victim and plaintiff-witness foreclose recovery."); *Paugh*, 451 N.E.2d at 766-67 ("With respect to the third factor, we believe that a strict blood relationship between the accident victim and the plaintiff-bystander is not necessarily required."). Indeed, in the seminal case of *Dillon v. Legg*, the Supreme Court of California warned that the three proximity elements should serve as flexible guidelines, each shading into each other, and that liability would need to be determined on a case-by-case basis. 69 Cal.Rptr. at 80-81, 441 P.2d at 920-21. Considering that Gottshall and Johns had been friends for fifteen years, in these jurisdictions Gottshall's claim would be cognizable and would be presented to the jury.

Even if Gottshall does not satisfy the traditional bystander test, the principle underlying the rule applies

in this FELA case. In light of the relationship between FELA and the common law, and the policies governing FELA, the lack of a familial relationship between the plaintiff and the victim does not necessarily remove the indicia of genuineness.

We must provide relief for injuries consistent with the realities of working in the railway industry. The conditions and concepts of industry's duties toward its workers often mirror the development of common law's concept of tort law, which has largely embraced the theory of a claim for emotional harm. We can no more ignore this development than go back to the traditional rules of master and servant. But the reality in the railway industry is that there will hardly be a situation where one sees another family member injured while working in the railroad yard. The common law rule requiring a familial relationship is based on the same principles that bind all rules governing negligent infliction of emotional distress, that is, to separate the wheat from the chaff. The theory, of course, is that when a family member is injured or killed there is real emotional trauma and grief.

Aside from the obvious certainty in the law it produces, the familial proximity element is of little value as a test to determine valid FELA claims. That element is tied to two policy considerations. First, common law courts must set forth generally applicable rules of law that must apply to society as a whole. In *Corso v. Merrill*, 119 N.H. 647, 406 A.2d 300 (1979), the New Hampshire Supreme Court recognized the bystander cause of action when a mother witnessed her child injured. The dissent articulated the concerns all common law courts share:

> Past experience teaches me that this is not the end. This case may be limited to parent and child, but what about the child-parent case, or that of the husband and wife, brother and sister, grandparent and grandchild, the fiancee or close friend? There is just no way a logical distinction can be drawn and liability to these people will be thrust upon us in years to come. Love and affection is not necessarily confined to parenthood or even blood relationship.

406 A.2d at 308. Thus courts are wary of judicially expanding the bystander cause of action into the "fantastic realm of infinite liability." *Amaya v. Home Ice, Fuel & Supply Co.*, 59 Cal.2d 295, 315, 29 Cal.Rptr. 33, 379 P.2d 513 (1963), overruled, *Dillon v. Legg*, 69 Cal.Rptr. 72, 441 P.2d 912.

Second, state courts have been wary of the public policy ramifications from recognizing certain relationships for purposes of tort law. For example, in *Elden* the California Supreme Court refused to apply bystander liability for unmarried cohabitants because "the state has a strong interest in the marriage relationship; to the extent unmarried cohabitants are granted the same rights as married persons, the state's interest in promoting marriage is inhibited." 250 Cal.Rptr. at 258, 758 P.2d at 586. One can easily see the public policy quagmire states would be bogged in if they recognize other less traditional relationships for the purposes of common law torts.

The insistence that the victim and plaintiff stand in a familial relationship affixes the cause of action at an arbitrary point on a continuum of relationships and is

inconsistent with FELA policies. Common experience tells us that we do not grieve for only those in our immediate family. It is true we are likely traumatized whenever a family member is killed or severely injured; but the "same would often be true of very close friends." *Id.* By trying to exclude the frauds and opportunists, this common law theory excludes the truly injured as well.

Moreover, the policy concerns that drive the rule do not apply to FELA. There is little chance that federal courts will be enmeshed in state public policy implications by recognizing certain relationships when considering whether the plaintiff and victim railroad coworkers were closely related. In FELA, Congress, rather than the courts, created the cause of action and allocated the economic and social burdens. See Typescript 24-27. In discerning the congressional intent, the Supreme Court has repeatedly said that recovery should be liberally granted under the FELA policies. Recovery will not exponentially expand to the "fantastic realm of infinite liability" and place an intolerable burden upon society because the cause of action is limited to FELA cases.

The relational proximity element is "indisputably arbitrary since it is foreseeable that in some cases unrelated persons have a relationship to the victim or are so affected by the traumatic event that they suffer equivalent emotional distress." *Thing*, 257 Cal.Rptr. at 879, 771 P.2d at 828. In FELA cases, more so than common law negligence actions, we must curtail arbitrary line drawing so that the remedial and humanitarian goals of the statute can be fully implemented. To the extent doctrinal requirements of the common law encroach upon FELA policies and preclude remedies in meritorious cases, the common

law must bow. We have full confidence that, with rigorous judicial attention to the facts to assure that the circumstances are sufficiently clear to confirm the genuineness of the claim, the court and the jury, drawing upon their combined human experiences in the course of a trial, will distinguish between victims and fakes and between close relationships and mere acquaintances.

Gottshall was not only a bystander closely related to the victim, but was also an active participant. The factual scenario akin to the one in *Althoff* is sufficient to bring a FELA action. *Outten*, 928 F.2d at 78-79. There, Althoff was operating a crane when the crane released an object that fell and killed the victim. He did not witness the injury nor was he within the zone of danger, but he did see the victim immediately after the accident. The district court concluded "plaintiff was not a passive bystander, but an *active participant* in the events giving rise to the accident: plaintiff was the operator of the device which turned out to be the prime mover of the events which culminated in Mr. Lauver's destruction." (Emphasis added.) Because an emotional injury is reasonably foreseeable in these kinds of circumstances, they provides the necessary assurance to present a jury question. *Id.* at 79.

Here Gottshall was more than a mere witness at the scene. While not a cause, he was an active participant in the events leading to Johns' death. He was among the first to rush to Johns' assistance. He gave mouth-to-mouth resuscitation and CPR to Johns for a full forty minutes. He carried the body of his friend to the ambulance parked two thousand feet away. The sense of loss and helplessness as one's friend dies beneath one's breath and the resulting emotional injury that he would suffer is

easily foreseeable. Gottshall recalled, "Watching my close friend die, having him die in my own hands during CPR as a result of the extreme working conditions that Conrail imposed upon us, was unlike anything I had ever experienced." One worker observed, "it really hit him hard. With him knowing CPR and he couldn't bring him back, and I guess Dick was a good friend of his." The next day the same worker observed Gottshall was "[l]ike more or less upset with himself about it." Even Norvick, the Conrail supervisor, acknowledged, "Well, he took it hard like all of us. I mean, Mr. Gottshall was performing CPR on him and giving his breath into Johns. And when you don't revive somebody, you take it personal. I mean, I know I would."

Finally, the *Buell* Court hinted that physical symptoms of severe psychological illness are a factor. 480 U.S. at 569-71 & n. 22, 107 S.Ct. at 1418 & n. 22. The Court there confronted the issue of whether a claim for purely emotional injuries is cognizable. In declining to decide this issue, the Court noted that once the facts are fleshed out the case might not present this issue of pure emotional injury as the plaintiff "claimed to have suffered physical symptoms in addition to his severe psychological illness." *Id.* Indeed it is this issue that has confounded, divided and silenced federal courts. See *Stoklosa*, 864 F.2d at 426 (declining to address the issue); *Adams*, 899 F.2d at 539 (same); *Elliott*, 910 F.2d at 1229 (same); *Robert*, 832 F.2d at 7 (same); *Gaston*, 866 F.2d at 821 (same); *Plaisance*, 966 F.2d at 169 (same). But see *Taylor*, 787 F.2d at 1313 (purely emotional injuries cognizable); *Plaisance*, 937 F.2d at 1009 (same).

This case likewise does *not* involve a claim for purely emotional injuries. At oral argument Gottshall's counsel challenged Conrail to argue that Gottshall's claim was fraudulent. Conrail wisely declined the challenge. Its reticence is understandable considering Gottshall has satisfied the common law's "physical manifestation" test. He lost forty pounds. See *Wilson*, 939 F.2d at 265 (weight loss is physical manifestation of emotional injury). He was institutionalized for three weeks and thereafter received continuing out-patient treatment. See Restatement § 436 A & Comment c (emotional distress may be compensable if accompanied by "bodily harm or other compensable damage"; long continued mental disturbance may be classified as a "physical illness, which is bodily harm"). He was diagnosed by three doctors as suffering from major depression and post-traumatic stress disorder. He had suicidal preoccupations, anxiety, sleep onset insomnia, cold sweats, loss of appetite, nausea, physical weakness, repetitive nightmares and a fear of leaving home. See *Towns v. Anderson*, 195 Colo. 517, 579 P.2d 1163, 1164 (1978) (en banc) (nightmares, sleepwalking, nervousness and irritability showed sufficient physical manifestation resulting from emotional distress); *Savard v. Cody Chevrolet, Inc.*, 126 Vt. 405, 234 A.2d 656, 657, 660 (1967) (nervous shock, sleeplessness, loss of appetite resulting in weight loss, faintness and trembling showed sufficient physical manifestation resulting from emotional distress); *Daley v. LaCroix*, 384 Mich. 4, 12-13, 179 N.W.2d 390, 395-96 (1970) (weight loss, inability to perform household duties, extreme nervousness and irritability are facts from which a jury could find a compensable physical injury); *Dobelle v. National R.R. Passenger Corp.*, 628 F.Supp. 1518,

1522, 1526-27 (S.D.N.Y.1986) (hospitalization, subsequent out-patient treatment, major depression, crying spells, weight gain, and sleep disturbances showed sufficient physical symptoms to constitute "bodily harm"); *Johnson*, 372 N.Y.S.2d at 639, 334 N.E.2d at 591 (recurrent nightmare, terrifying dreams of death, difficulty in concentrating, irritability, inability to function at work properly, tenseness and anxiety, as well as psychiatric confirmation of the emotional distress showed objective manifestations of the injury). Gottshall's physical symptoms objectively confirm what he has been alleging and what three doctors diagnosed.[7] These symptoms are then evidence of

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[7] "Psychiatric/psychological examining techniques have increased markedly in sophistication since the advent of the physical impact, zone of danger and ensuing physical injury rules. As a result, successfully feigning a psychic injury is not an easy matter." Bell, *The Bell Tolls: Towards Full Tort Recovery for Psychic Injury*, 36 U.Fla.L.Rev. 333, 351 (1984) (cited by *Buell*, 488 U.S. at 569-71 n. 20, 107 S.Ct. at 1418 n. 20). "The existence and extent of mental distress is no longer generally viewed as so substantially different from, and easier to feign than, physical injury as to require qualitatively different rules of recovery. This change in perception reflects, in part, an increasing judicial notice and acceptance of the advances in the medical and behavioral sciences." Supra n. 1, Comment, 33 Vill.L.Rev. at 789. "In judging the genuineness of a claim of mental distress, courts and juries may look to 'the quality and genuineness of proof and rely to an extent on the contemporary sophistication of the medical profession and the ability of the court and jury to weed out dishonest claims.' " *Rodrigues v. State*, 52 Haw. 156, 172, 472 P.2d 509, 519-20 (1970). Accord *Champion*, 420 So.2d at 350; *Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84, 86 & n. 3 (1970); *Sinn v. Burd*, 486 Pa. 146, 404 A.2d 672, 678-79 (1979); *Battalla v. State*, 10 N.Y.2d 237, 219 N.Y.S.2d 34, 37-38, 176 N.E.2d 729, 731-32 (1961); *Towns*, 579 P.2d at 1164; *Versland*, 671 P.2d at 588.

the degree of mental distress suffered. *Leong*, 55 Haw. at 403, 520 P.2d 758; *Paugh*, 451 N.E.2d at 765; *Versland*, 671 P.2d at 588.

After considering Gottshall's claim under the common law physical manifestation rule, the principles underlying the *Dillon* bystander and *Althoff* active participant rules as adopted in *Outten*, as well as the medical diagnosis of three doctors, we believe that Gottshall has sufficiently shown that his injuries are genuine and severe to create a genuine issue for the jury to decide.

IV.

Satisfied that this claim has passed the threshold burden, we must next consider it in the context of what actually is required for FELA: breach of a duty, injury, and causation.

The concept of negligence in the context of emotional harm claims remains the same as for physical harm. Negligence is conduct that falls below the standard established by law for the protection of others against unreasonable risk. Restatement § 282. It is a failure to do what the reasonable person would do under like circumstances. Id. § 283. It must be commensurate with the known danger and the consequences that might reasonably be anticipated from the negligent conduct. *Urie*, 337 U.S. at 178-80, 69 S.Ct. at 1029. It therefore necessarily involves a foreseeable risk of injury and conduct unreasonable in proportion to the danger. *Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140, 80 S.Ct. 242, 243, 4 L.Ed.2d 198 (1959). See The Law of Torts, § 43, at 280.

Foreseeability was the focal point in *Outten*. We explained that the *Dillon* bystander rule "reduces the likelihood that fraudulent or trivial claims will be brought and ensures that the resulting injury is sufficiently foreseeable so that it is not unreasonable to hold the defendant responsible." 928 F.2d at 78. Likewise we said the rule in *Althoff* is premised on the same notion, that "it is foreseeable that one who operates an instrumentality that causes another's death would be subject to considerable emotional distress from any guilt that operator might feel." *Id.* at 79. Thus "it is hardly foreseeable," we remarked, "to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a 'perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the wrongful act.' " *Id.* (quoting The Law of Torts, § 54, at 361).

In *Holliday* we concluded that Holliday's injuries, "though obviously germane to the assessment of Holliday's condition, have no bearing on the character of Conrail's allegedly tortious activity." 914 F.2d at 425. Our focus on the relationship between the injury and the alleged tortious act suggests that our conclusion there rested on the unforeseeability of emotional injuries attributable to "an ordinary management decision." Thus if an employer is liable for consequences that cannot reasonably be foreseen, even "the most attenuated claims could be advanced." *Id.* In *Holliday* and *Outten* the railways did not breach a duty because the consequences could not be reasonably anticipated from their conduct, which, as we

emphasized, did not subject the plaintiffs to physical danger or to witness an injury-causing accident.

This case is not like *Holliday* and *Outten*. Gottshall was subjected to the same physical danger that killed Johns, and he was aware that that force could kill him too. His emotional distress was not attributable to merely the ordinary stress of the job, but was attributable to the extreme stress of witnessing and participating in a fatal accident involving one of his close friends as well as the continuing fear that he would die in the same manner.

The issue is whether Conrail's conduct breached a duty of care. Had Conrail simply worked its men in hot weather, weather falling within the broad spectrum of conditions that constitutes ordinary working conditions, *Holliday* would preclude this claim. *Holliday* stands for the general proposition that employment in the railway industry, like employment elsewhere, entails some risks that all employees must bear and employers should not be the insurers for injuries arising out of working in ordinary conditions of the job. We there refused to extend liability for job stress because "employees in all walks of life are placed in difficult, tense job situations, sometimes for extended periods, so there was nothing unusual here." *Id.* But the conditions Gottshall and his crew experienced were unusual.

Adverse weather conditions may constitute dangerous working conditions and impose upon the employer a duty to exercise a degree of care commensurate with the risks. *Fort Worth & Denver City Ry. Co. v. Smith*, 206 F.2d 667, 669 (5th Cir.1953); *Anderson v. Elgin, Joliet & E. Ry. Co.*, 227 F.2d 91, 95-96 (7th Cir.1955); *Britt v.*

Terminal R.R. Ass'n, 311 S.W.2d 130, 134 (Mo.App.1958). Indeed had Conrail sent its men to work on steel rails in the middle of an electrical storm and had an employee been killed by lightning, there would certainly be a jury question as to negligence. See *Childs v. Rayburn*, 169 Ind.App. 147, 346 N.E.2d 655, 660 (1976); *Johnson v. Kosmos Portland Cement Co.*, 64 F.2d 193, 196 (6th Cir.1933). See also *Crutchfield v. Bogle*, 270 P.2d 640, 642 (Okla.1954). Here Conrail's conduct goes far beyond simply working men in hot weather. There is a genuine issue of whether Conrail subjected its men to unreasonably dangerous working conditions and whether that conduct was unreasonable in proportion to the risk.

The accident happened during one of the most severe heat waves in recent memory. A Conrail supervisor recalled that he had not experienced such a stretch of hot weather since 1946 or 1948. The extreme heat combined with the humidity made several workers apprehensive. They complained to Conrail supervisors that conditions were too extreme. One worker said, "They guys [sic] were saying it's too hot out here to work. You shouldn't be out here working."

When asked to define "extreme weather conditions," Dr. David C. Deubner, Chief Medical Officer for Conrail at the time of the accident and currently Assistant Vice President of Conrail's Medical Resources Management Department, opined "it is when it's hot, it's humid and the sun is shining." In such extreme weather conditions, he said, Conrail had a widely spread oral practice to vary the work rate with the severity of the weather conditions. Such precautions are necessary because "If people are doing very heavy cardiovascular labor, then it should be

slowed down and have longer work breaks, more frequently longer breaks when it gets very hot and humid. . . . that's why when the sun gets too high, you recommend slowing down and having more rest. So your goal in protecting people is to keep the total degree of effort within bounds." He believed these precautions make simple "common sense."

Dr. Deubner also said Conrail had a policy of evaluating an employee's "safe function capacity." Upon such evaluation, Conrail matched an employee's physical health with a physically compatible job function. On March 29, 1988, about four months before the accident, Johns was examined by a Conrail doctor. The medical report indicated Johns was 56 years old, was 5'-1/2" tall and weighed 187 pounds. It also indicated that Johns suffered from high blood pressure, athero or arteriosclerotic cardiovascular disease, and was taking medication. Additionally, Conrail knew most of the men, many overweight, were over 50 years old and some approaching 60 years. It knew that one other worker had previously suffered a serious heart attack. Dr. Deubner suggested that heavy cardiovascular work can interact with a worker's physical conditions so that, depending on those conditions, the overall risk can be enhanced.

He also believed that working in an isolated area poses a greater medical risk because an injured worker "can benefit by timely medical care." The coroner confirmed that had Johns received prompt medical attention his chances of survival "would have significantly increased." Access to communication was therefore crucial.

On the day of the accident, the temperature was hovering at 97 degrees; it was very humid; the sun was shining; the field was in the open; and work started at high noon. Conrail sent middle-aged, overweight men, some with serious cardiovascular health problems, to do very heavy cardiovascular labor at an extremely rapid pace of work. Although Conrail's own medical director recommends work "be slowed down and have longer work breaks, more frequently when it gets very hot and humid," Conrail failed to give the men any scheduled breaks. It concedes on appeal, "They were not entitled to formal breaks, but could drink water when they wished." Conrail Br 8. A Conrail supervisor confirmed, "That's one thing they were allowed to do, get water." The tracks were isolated, but Conrail failed to provide means of communication in case of an emergency.

These circumstances alone would be sufficient to conclude that a reasonable employer should have foreseen the risks and, at minimum, taken one or more of the "common sense" precautions suggested by Conrail's Chief Medical Officer, such as providing communication equipment in case of an emergency, varying hours and pace of the work, incorporating periodic rest breaks and removing those employees who might be particularly susceptible to the conditions.

There is also direct evidence that Conrail actually knew the risk of danger and foresaw the tragedy that was to come. On the day of the accident, several workers complained of the weather conditions and told Norvick it was too hot to be working. Before Johns died, Conrail had frequently discussed implementing a formal policy to

address extreme weather conditions such as the conditions experienced by Gottshall's work gang. Conrail had also considered giving its men CPR training. Norvick thought CPR training was a good idea because "all of the fellows were up in age." A training session with the American Red Cross had been set up, but Conrail ultimately canceled it "because of the liability factor."

In *Burns v. Penn Central Co.*, 519 F.2d 512 (2d Cir.1975), unknown assailants had been stoning the railway's cars for months. The railway knew of these attacks but did nothing, and one day an employee was killed by a sniper's rifle shots. The Court of Appeals for the Second Circuit reversed the district court's grant of directed verdict for the railway based on an alleged lack of foreseeability. It concluded, "Based on the railway's actual knowledge of stonings in the vicinity in recent months and its constructive (and indubitably actual) knowledge of the generally dangerous conditions prevailing in the neighborhood in which the fatality transpired, the jury would have acted well within its authority under the FELA by returning a verdict for Mrs. Burns." *Id.* at 514-15. The factual circumstances in *Burns* are similar to this case, and that court's conclusion is correct.

Furthermore, foreseeability of harm and foreseeability of the particular injury resulting are different. In *Palsgraf v. Long Island R.R. Co.*, 248 N.Y. 339, 162 N.E. 99 (1928), the Court held that a railroad guard could not have reasonably foreseen that his benign action, helping to board a man carrying a small package, could have resulted in an explosion injuring Helen Palsgraf who was standing far away. In another words, the railroad guard could not possibly have foreseen any harm to Palsgraf.

Importantly, *Palsgraf* was not a FELA case. Moreover, we simply have a different case.

In *Gallick v. Baltimore & Ohio R.R. Co.*, 372 U.S. 108, 83 S.Ct. 659, 9 L.Ed.2d 618 (1963), the worker was bitten on the leg by an insect, which was apparently attracted to a pool of stagnant water the railway left on the worksite. An infection grew and the leg was finally amputated. The railway specifically argued that the *injury* was not reasonably foreseeable. 372 U.S. at 116-18, 83 S.Ct. at 665. The Court disagreed and held that the precipitating event triggering the injury, the insect bite, was reasonably foreseeable. *Id.* 372 U.S. at 118-20, 83 S.Ct. at 666. It then reasoned "that for a defendant to be liable for consequential damages he need not foresee the particular consequences of his negligent acts." *Id.* 372 U.S. at 120, 83 S.Ct. at 667. See Restatement § 435. Thus, "[t]he test of foreseeability does not require that the negligent person should have been able to foresee the injury in the precise form in which it in fact occurred. Rather it is sufficient if the negligent person might reasonably have foreseen that *an* injury might occur. . . . " *Miller v. Cincinnati, New Orleans & Texas Pacific Ry. Co.*, 203 F.Supp. 107, 113 (E.D.Tenn.1962) (emphasis in original), affirmed, 317 F.2d 693 (6th Cir.1963).

Like *Gallick*, the precipitating event triggering Gottshall's injury was foreseeable. A genuine issue exists whether Conrail could reasonably have foreseen that its men, including Gottshall, would suffer injuries, emotional or physical, when it subjected middle-aged men, some with health problems, to the stark conditions without scheduled periodic breaks and ready access to communications equipment. If Conrail had a hand in creating

the dangerous working conditions that ultimately killed Johns, then under the rationale we enunciated in *Outten* a genuine issue also exists as to whether Conrail could have reasonably foreseen that Gottshall, or any other employee, would then suffer emotional injuries from the tragic events brought about by Conrail's negligence. 928 F.2d at 78-79.

But assuming, arguendo, that Conrail's conduct comported with a reasonable person's leading up to Johns' death, its conduct after the death raises an issue of whether it breached a legal duty. The general duty of care includes a duty to provide a reasonably safe workplace. *Bailey v. Central Vermont R.R., Inc.*, 319 U.S. 350, 352-53, 63 S.Ct. 1062, 1064, 87 L.Ed. 1444 (1943). This duty includes a duty to guard against conditions in the workplace that cause emotional harm to employees. *Buell v. Atchison, Topeka & Santa Fe Ry. Co.*, 771 F.2d 1320, 1323 (9th Cir.1985), affirmed in part and vacated in part, 480 U.S. at 567-71, 107 S.Ct. at 1417-18.

Gottshall alleges that he suffered emotional injuries partly because after the accident he feared he would also die in the same manner. After Johns died, his corpse was laid on the ballast beside the track. With work to be done, Conrail ordered its men back to work to do the very thing that felled Johns. As one Conrail supervisor explained, "After everything was taken care of, they had to go back and finish the railroad, because we had to give the railroad back." During this time Johns' corpse was in full view of the men, including Gottshall. Even after they completed the work, Conrail ordered the men to stay at the worksite, though nothing required them to stay. Gottshall was forced to view the corpse for a full three hours.

The very next day, Conrail did nothing to remedy the extreme physical conditions. The heat wave persisted. Conrail pushed its men even harder and still discouraged them from taking breaks, with water the only source of relief from the severe conditions. They were told, "Don't come in until you are done." Under these conditions the men worked a full shift and three or four hours of overtime, and when they finished, they were told, "Is that all you did today." But for the Grace of God, thought Gottshall, the physical force Conrail subjected its men could have killed him as well.

Ordinary stress of the workplace does not create an unsafe working environment. It and a variety of working conditions comprise the negotiated circumstances of the employees' duties. There is, however, evidence that conditions that day were anything but "ordinary," much less characterized as a "negotiated circumstance." Indeed, they were extreme. Gottshall swore, "Watching my close friend die, having him die in my own hands during CPR as a result of the extreme working conditions that Conrail imposed upon us, was unlike anything I had ever experienced either on the railroad, or otherwise, and it deeply, deeply, disturbed me." Gottshall had worked for Conrail for fourteen years and never had psychological or emotional problems. Another worker swore in an affidavit, "The conditions at the Watsontown Secondary on the date of the accident were substantially more severe than the general working conditions associated with the job. The extreme heat and humidity, and the pace of the work, were unbearable." Another worker swore, "Working on a division gang can be strenuous. However, the situation on the date of Mr. Johns' death, involving extreme heat,

no breaks, no shade and being pushed very hard, was something different." Gottshall recalled, "It was 97 degrees. It was hot and humid. They put us out there to change rails, push, push, push. . . . I'm not an animal."

We cannot casually assume work under these extreme conditions to be a "negotiated circumstance." The combination of the conditions created not only physical hazards, but constituted emotional hazards which can equally debilitate and scar an employee, particularly one who had just witnessed a friend die under the same conditions. Additionally, Conrail wholly created the circumstances where Gottshall had to watch his friend's body "bake like a potato" while doing the very thing that killed him under the same hostile conditions.

FELA "is not to be narrowed by refined reasoning or for the sake of giving 'negligence' a technically restricted meaning. It is to be construed liberally to fulfill the purposes for which it was enacted, and to that end the word may be read to include all the meanings given to it by the courts, and within the word as ordinarily used." *Jamison*, 281 U.S. at 640, 50 S.Ct. at 442 (citations omitted). In the totality of the terrible circumstances surrounding this case, we are unwilling to say that Conrail was not negligent as a matter of law. "[F]oreseeability of harm is no less a matter generally left to the jury's broad decision than any other part of the requisite proof to recover under the FELA." *Burns*, 519 F.2d at 514. We have no trouble concluding that the facts, as presented to us and in light most favorable to Gottshall, present a genuine issue of material fact whether Conrail breached a general duty of acting with care and a duty to provide a safe workplace.

We likewise have no trouble concluding that a genuine issue exists whether Gottshall sustained cognizable injury as a result of emotional trauma. Gottshall was institutionalized for about three weeks; three doctors diagnosed him as suffering from severe post-traumatic stress syndrome; and he exhibited objective, physical symptoms of his emotional injuries. See supra Typescript 42-43. We also have no trouble concluding that a genuine issue exists as to whether Conrail's negligence "played any part, however small, in the injury or death which is the subject of the suit." *Rogers*, 352 U.S. at 508, 77 S.Ct. at 449. The law of this circuit is that a court may take a case from jury consideration on causation grounds "only in those extremely rare instances where there is zero probability either of employer negligence or that any such negligence contributed to the injury of an employee." *Pehowic v. Erie Lackawanna R.R.*, 430 F.2d 697, 699-700 (3d Cir.1970).

Because a railway employer's duty is high and FELA provides for a most lenient causation inquiry, a court must be cautious in granting summary judgment. "It is well established that the role of the jury is significantly greater in Jones Act and FELA cases than in common law negligence actions. The right of the jury to pass upon the question of fault and causation must be most liberally viewed." *Johannessen v. Gulf Trading & Transp. Co.*, 633 F.2d 653, 656 (2d Cir.1980). See *Green v. River Terminal Ry. Co.*, 763 F.2d 805, 807 (6th Cir.1985); *Eggert v. Norfolk & W. Ry. Co.*, 538 F.2d 509, 511 (2d Cir.1976); *Boeing Co. v. Shipman*, 411 F.2d 365, 370-73 (5th Cir.1969) (en banc); *Pierce*, 823 F.2d at 1370 (9th Cir.) (citing *Ybarra v. Burlington N., Inc.*, 689 F.2d 147, 149 (8th Cir.1982)). "By

enacting FELA, Congress desired to 'secure jury determinations in a larger proportion of cases than would be true of ordinary common law actions.' " *Hines v. Consolidated Rail Corp.*, 926 F.2d 262, 269 (3d Cir.1991) (quoting *Shipman*, 411 F.2d at 371). Indeed under FELA "trial by jury is part of the remedy." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 360, 82 S.Ct. 780, 783, 7 L.Ed.2d 798 (1962). Viewing all the facts in the light most favorable to Gottshall, we are confident that his claim has sufficient indicia of genuineness and that Gottshall has satisfied the requisite elements for pleading a FELA action to entitle him to trial on the merits.

V.

In so concluding, we are aware, and emphasize, that even under the liberal recovery policy under FELA, the employer is not the insurer of the worker's safety. As in the common law, there must be some finite limit to the railway's potential liability. See *Thing*, 257 Cal.Rptr. at 878, 771 P.2d at 827 (to delimit liability "policy considerations justify restrictions on recovery for emotional distress notwithstanding the sometimes arbitrary result"); *Elden*, 250 Cal.Rptr. at 258, 758 P.2d at 586 ("social policy must at some point intervene to delimit liability"). The Court of Appeals for the Fifth Circuit explained that one reason behind the common law's restrictive tests is to avoid

> multiplying damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that

> venture – factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence and the like.

Gaston, 866 F.2d at 820. Even when a worker's injuries are real and demonstrable, the *Gaston* court believed that exposing employers to such potentially ruinous liability "involves evaluating economic trade-offs which we (or any other court) are poorly equipped even to envision, let alone to weigh against each other." *Id.*

We agree insofar as strong policy reasons preclude finding liability for "every possible distressful happening to which a railroad worker is exposed." *Outten*, 928 F.2d at 79. See *Holliday*, 914 F.2d at 425. This policy simply echoes the belief that frivolous claims for trivial emotional disturbances and bruised feelings that are ordinary and expected as a part of daily life, such as stress from the ordinary conditions of the workplace, are not cognizable. To this end, the proper limits on liability are those fixed by generally applicable principles of tort law. Recognizing the reality that every act or omission can affect the procession of human events, the law through the years has considered the proper balance between remedying the injured individual and exposing every member of society to the myriad of possible consequences of living in a complex world. In the case of physical injuries, the law has dealt with this problem through concepts such as duty, foreseeability, and proximate cause. Given that the employer owes a duty to provide a safe workplace, once the employer breaches that duty through an act or omission creating a foreseeable risk, that fortuity

determines the number of persons actually injured or the extent of those injuries does not prevent recovery.

A simple example will serve. Imagine that the employer negligently caused a railroad accident in which fifty workers were killed or injured. That the employer's liability depends, to some extent, on factors that it had no way of controlling is irrelevant for the purpose of imposing liability. True, the aggregate liability on the negligent employer in this case would be severe. But where the risk was reasonably foreseeable, where the danger was disproportionate to that risk, and "where the concern is to avoid imposing excessive punishment upon a negligent defendant, it must be asked whether fairness will permit leaving the burden of loss instead upon the innocent victim." The Law of Torts, § 54 at 361. When a claim for emotional injuries shows a sufficient indicia of genuineness so as to create a factual dispute, the same tort principles apply to the employer's liability.

The federal courts bear the duty of determining this liability and fashioning remedies. By placing the onus of performing this task on the federal courts, Congress has dictated that we evaluate the economic trade-offs and properly balance the competing policies. Congress has, however, given us some guidance in how to strike this balance. It has provided that recovery be liberally granted and that the railway industry, as a single economically sufficient enterprise, bear the social and economic burdens of workers who give their labor to further the common endeavor and who have suffered as a result of their employers' negligence. Congress promulgated FELA to promote "the welfare of both employer and

employee, by adjusting the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden." *Sinkler*, 356 U.S. at 330, 78 S.Ct. at 762 (quoting Sen.Rep. No. 460, 60th Cong., 1st Sess. 3). See supra 25-27. Where the burden becomes heavy on a railway, it is only because in seeking to achieve the ends of the enterprise the railway has placed an equally heavy burden on its workers, a burden paid in lost lives, limbs, and livelihoods. When an employer breaches a duty of care to provide a safe workplace, it is liable under FELA if an employee suffers an injury, physical or emotional, causally related to its negligence.

We are also aware of the *Kraus* court's admonitions about incalculable and potentially unlimited damages, floods of litigation, and fraud. See *Holliday*, 914 F.2d at 424; The Law of Torts, § 54, at 360-61; Restatement § 436A comment b. But we must also be aware that these concerns cannot become the incantations by which railway attorneys make all plaintiff's claims disappear. Dean Prosser has observed:

> The same objections against allowing recovery have been advanced here as well: that mental disturbance cannot be measured in terms of money, and so cannot serve in itself as a basis for the action; . . . that there is a lack of precedent, and that a vast increase in litigation would follow. All these objections have been answered many times, and it is threshing old straw to deal with them. Mental suffering is no more difficult to estimate in financial terms, and no less a real injury, than "physical" pain; it is not an independent intervening cause, but a thing brought

> about by the defendant's negligence itself, and its consequences may follow in unbroken sequence from that negligence; and while it may be true that its consequences are seldom very serious unless there is some predisposing physical condition, the law is not for the protection of the physically sound alone. It is the business of the courts to make precedent where a wrong calls for redress, even if lawsuits must be multiplied; and there has long been precedent enough, and no great increase in litigation has been observed.

The Law of Torts, § 54, at 360. See *Corso*, 406 A.2d at 306 (where rule allows for more liberal recovery "the adoption of well-defined foreseeability factors will not lead to unlimited liability, and that the threat of remote and unexpected liability is not a substantial fear") (cited by *Buell*, 480 U.S. at 569-71 n. 21, 107 S.Ct. at 1418 n. 21); *Ramirez v. Armstrong*, 100 N.M. 538, 542, 673 P.2d 822, 826 (1983) (same); *Schultz v. Barberton Glass Co.*, 4 Ohio St.3d 131, 133, 447 N.E.2d 109, 111 (1983) (expressing doubts that problem of increasing litigation is real, and if real, would be unacceptable reason for denying recovery in meritorious cases); *Toms*, 207 N.W.2d at 145 (rejecting the "opening the flood gates of litigation" argument as meritless).[8]

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[8] Indeed, as medical science continued to make strides and as the initial fear of inability to objectively and definitively verify these claims began to subside, the common law trend shows a greater receptivity towards these claims. Pennsylvania serves as an example.

Before 1970, Pennsylvania acknowledged only the physical impact rule of liability. See for example, *Knaub v. Gotwalt*, 422 Pa. 267, 270, 220 A.2d 646, 647 (1966). The cases applied this rule

Our research confirms the observation that litigation has not increased by allowing claims for emotional

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with "obstinate rigidity in that recovery was denied not only when the complaining party was a nearby witness, but also to the actual victim of the tortfeasor's negligence or frightening conduct." *Sinn*, 404 A.2d at 675 (citing *Bosley v. Andrews*, 393 Pa. 161, 142 A.2d 263 (1958)).

But in 1970, the Pennsylvania Supreme Court abandoned the physical impact test and adopted the more flexible zone of danger test, believing it was compelled by the "inherent humanitarianism of our judicial process." *Niederman*, 261 A.2d at 85. In so doing, it rejected the arguments that damages are incalculable, that the possibility of recovery in such claims will encourage fraud and frivolity, and that courts will be deluged with an avalanche of cases. *Id.* at 86-89.

With experience, the Pennsylvania courts realized that even the zone of danger test can be too restrictive and arbitrary. In 1979, the Pennsylvania Supreme Court remedied the situation by adopting the bystander rule of liability, believing that the deficiencies in the zone of danger test are "glaringly apparent." *Sinn*, 404 A.2d at 686. In so doing, it again rejected the argument that such a rule will lead to incalculable damages, fraud and frivolity, and a flood of litigation. *Id.* at 678-85. The court concluded, "It is clear that appellant's injuries were of a nature reasonably foreseeable under the circumstances alleged." *Id.* at 686. Thus a review of Pennsylvania law shows that Pennsylvania has reversed course, from applying almost case-barring restrictions on these types of claims towards applying generally applicable principles of tort law.

Other jurisdictions have followed similar trends. See for example, *Champion*, 420 So.2d at 352 ("Thus, we believe traditional principles of negligence analysis may be applied in such cases and the imposition of undue liability may be avoided by using the broader test of reasonable foreseeability."); *Leong*, 55 Haw. at 403, 520 P.2d 758 ("A survey of cases from other jurisdictions does not show the development of a logical and consistent rule, but reveals that the trend is a hesitant abandonment of such artificial restrictions and barriers to recovery in favor of a

distress. In the over five years since the *Buell* Court "opened the door," the courts of appeals reported seventeen cases involving a claim for emotional distress. See supra Typescript pp. 13-19. This appeal makes eighteen. This number in a span of five years can hardly be called a "flood" of litigation. If there was ever a time when we expected the flood of litigation, it was when the door was first opened. The apocalypse argued by the railway has not come to pass.

In *Buell* the railway contended that if emotional injuries are cognizable under FELA, virtually no employees will pursue grievances through the RLA since "every employee who believes he has a legitimate grievance will doubtless have some emotional anguish." 480 U.S. at 567 n. 13, 107 S.Ct. at 1416 n. 13 (quoting from the brief for the railway). One amicus asserted that a large portion of the 183,800 grievances filed in 1985 would be pursued as FELA actions instead, thus creating the "potential for doubling the volume of civil filings in the federal courts." *Id.* (quoting from amicus brief).

The Supreme Court unanimously and summarily rejected this "parade of horribles," exposing the strained assumption on which the railway relies, that is, that a significant percentage of employees bringing grievances

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greater reliance on general tort law principles and the contemporary sophistication of the medical profession to test the veracity of claims for relief."); *Hunsley*, 553 P.2d at 1102 ("Rather than add to the already existing confusion with the formulation of a new rule, we conclude that the wisest approach is to return to the traditional principles, theories, and standards of tort law.").

suffer the type of genuine and severe emotional injury that has generally been required to establish liability for purely emotional injury. *Id.* See *Moody*, 823 F.2d at 694 (recognizing Buell substantially rejected the "flood of litigation" argument).

The concerns articulated in *Kraus* must be balanced with the notion that "a flood of litigation" and fraudulent claims may serve judicial prudence, but it can never serve judicial convenience. "Although fraud, extra litigation and a measure of speculation are, of course, possibilities, it is no reason for a court to eschew a measure of its jurisdiction. 'The argument from mere expediency cannot commend itself to a Court of justice, resulting in the denial of a logical legal right and remedy in *all* cases because in *some* a fictitious injury may be urged as a real one.' " *Battalla*, 219 N.Y.S.2d at 37, 176 N.E.2d at 731 (emphasis in original) (quoting *Green v. T.A. Shoemaker & Co.*, 111 Md. 69, 81, 73 A. 688, 692 (1909)).

VI.

Before we conclude, it is important that we spell out what we are not holding. We are not holding that a railroad breaches a duty of care when it works its men in hot weather. We are not holding that an employer must refrain from pushing its men to do hard labor. We are not holding that every employee who suffers emotional injuries as a result of the railway employer's conduct has a valid FELA claim. We are not holding that every bystander to an accident has a valid FELA claim. We are not even holding that every bystander who sees a close friend injured or killed has a valid FELA claim.

We simply hold that considering the totality of these extreme facts in the light most favorable to Gottshall – that is, seeing and actively participating in the events surrounding the death of a friend of fifteen years as a result of Conrail's actions, which includes working men under extreme conditions without taking the precautions arguably required, being forced to stay at the worksite by Conrail for several hours, being forced to be subjected to the same physical force after the accident without the benefits of the precautions arguably required, checking into a mental hospital for three weeks, losing forty pounds, exhibiting other physical manifestations of severe emotional injury, being diagnosed by three doctors as suffering from severe post-traumatic stress syndrome – Gottshall's claim has sufficient indicia of genuineness and he presents genuine issues of whether there is a breach of a duty, injury and causation. He is entitled under FELA to a trial on the merits. We will reverse and remand.

ROTH, Circuit Judge, concurring and dissenting.

I agree with the majority's holding in Parts II A and B that under certain conditions claims for negligent infliction of emotional distress are cognizable under FELA. However, I must respectfully dissent from the majority's determination that the plaintiff here has a valid claim against Conrail for such an injury. In order to describe the reasons for which I come to this conclusion, I first look back to another rail line, the Long Island Railroad Company, and the unfortunate injury which occurred to Helen Palsgraf as she waited in the station for the train to Rockaway beach.

Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact, it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

Palsgraf v. Long Island R. Co., 248 N.Y. 339, 162 N.E. 99 (N.Y.1928).

To illustrate why I equate the present case with *Palsgraf*, I will begin with an account of the events surrounding the death of Richard Johns as he worked on the Conrail tracks in August 1988. In reviewing these events, we must keep in mind that it is not the family of Richard Johns who seek legal redress in this action. It is Johns' friend, James Gottshall, who makes the claim, based on his reaction to Johns' death. Analyzing this case in respect to *Palsgraf*, I see James Gottshall in the place of

Helen Palsgraf and Richard Johns in the place of the man who carried the package of fireworks.

It is not easy to ignore pain and suffering when considering whether a plaintiff can assert a cognizable legal claim to recover for injury. However, lying beneath the distress invoked by the factual account of Richard Johns' death is the structure of the applicable legal precedents. The question of the propriety of legal recovery for an injury may sometimes be better explored if that factual account is made concisely.

Even though his description of the events leading up to Helen Palsgraf's injury is sparing, Justice Cardozo sets forth the facts necessary to ascertain the scope of liability. Cardozo found no liability on the part of the Long Island Railroad to Mrs. Palsgraf because "[t]he conduct of the defendant's guard, if a wrong in its relation to the holder of the package, was not a wrong in its relation to the plaintiff, standing far away." *Id.* In effect, Cardozo found that the Long Island Railroad had no duty to protect Mrs. Palsgraf from the harm caused by the exploding fireworks because it was not reasonably foreseeable that such an injury would occur. For this reason, Cardozo concluded, the railroad had no duty to prevent or avert the injury to Helen Palsgraf.

Similarly in the case before us, I find no liability on the part of Conrail to James Gottshall because any duty Conrail may have violated would have been a duty to Richard Johns; the impact on James Gottshall of any negligence on the part of Conrail could not have been reasonably foreseeable to Conrail.

Concisely, these are the facts of this case: On an exceedingly hot day in August 1988, a Conrail work gang of nine men, including James Gottshall and Richard Johns, was replacing defective track along a remote stretch of rail line. Gottshall and Johns were friends. About two and a half hours after the gang began working, Richard Johns collapsed. Michael Norvick, the gang supervisor, was unable to radio for assistance because, without notifying the work gang, Conrail had taken the communications base station off the air for repairs. Norvick then drove out from the work site and placed an emergency call for assistance. During this interval, Gottshall attempted cardiopulmonary resuscitation on Johns. His efforts were in vain. By the time the paramedics arrived, Richard Johns had died. The paramedics instructed Norvick to leave Johns' body where it was until the coroner arrived. The body was covered, and Norvick ordered the men to resume work. After the coroner arrived and conducted his investigation, he reported that Johns had died from a heart attack, precipitated by the excessive heat and humidity, combined with the heavy physical exertion. The coroner also stated that Johns' chances of survival would have been significantly enhanced if he had received more prompt medical attention.

After Johns' death, Gottshall returned to work for several days under the same weather conditions. He then told his supervisor that he couldn't take it anymore, the heat and exhaustion. He returned home and secluded himself in his basement. He subsequently spent three weeks in a psychiatric institute. After his discharge, he continued to receive outpatient psychological therapy.

Gottshall brought suit under FELA, alleging that Conrail's negligence created the circumstances under which he was forced to watch and participate in the events surrounding the death of his friend. However, in reviewing Gottshall's claim, it is difficult to determine exactly what he contends was negligent conduct on the part of Conrail. In his brief, Gottshall describes the negligent acts which he alleges converged to cause his injury. These are comprised of Conrail's: 1) pushing Gottshall and the other members in his crew relentlessly in the midst of a scorching heat wave; 2) failing to provide adequate scheduled workbreaks; 3) discouraging unscheduled workbreaks; 4) canceling a planned course on cardiopulmonary resuscitation; 5) scheduling the men to work under these conditions in remote job locations; and 6) knocking out the radio relay that provided Gottshall and his co-workers with their only access to emergency communications. Brief of Plaintiff-Appellant James Gottshall, p. 35.[1]

Gottshall's counsel was questioned at oral argument about the negligent nature of these acts. In response, he spoke of the combination and convergence of events which created the negligence and caused Gottshall's

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[1] Elsewhere in his brief, Gottshall notes other incidents, such as Norvick driving out to call for help without taking Johns with him and Norvick covering the body and leaving it in place until the coroner arrived in accordance with the instructions of the paramedics. These instances are not cited as negligent acts in the brief but apparently as exacerbations. Since I cannot conclude that these examples violated any duty on Conrail's part, I do not include them in the cited list of negligent acts, taken from Gottshall's brief.

injury. However, if we examine these claims individually, these allegations consist for the most part of the negotiated circumstances of the duties of this work crew. Moreover, Gottshall is not prepared to designate particular ones of these allegations as negligent acts in and of themselves. He is not arguing that his working conditions were negligently established by Conrail and the union. Indeed, such a claim would not succeed. This court held in *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir.1990) that we will not upset the working rules and working conditions of rail workers' jobs, as structured by management and as monitored by the union. To do so would upset the delicate balance of the collective bargaining agreement absent a more compelling reason. *Id.*

However, to escape our holding in *Holliday*, Gottshall contends that it is more than the individual factors of the working conditions which comprise Conrail's negligence; it is the combination of occurrences which created the negligence on Conrail's part:

> Importantly, Gottshall does not assert that defendant was negligent simply because it required Gottshall's crew to work hard in hot weather, or because defendant had cancelled its CPR course, or merely because of any of the other individual aspects of defendant's negligence. Gottshall claims that defendant's negligence lay in its allowing all of these condiditons [sic] to converge at once; that is why this case is atypical and does not involve a worker's disatisfaction [sic] with general working conditions.

Brief of Plaintiff-Appellant James E. Gottshall, p. 35, n. 14.

Plaintiff has acknowledged that Conrail was not negligent on the sole basis that it sent out the work gang that day or that it sent out the particular men who made up the gang. As to the conditions at the work site, water, shade, and the opportunity to take individual breaks were available there. Moreover, railroad workers inevitably have to work on the rail lines in remote places. This factor is a part of regular working conditions. In regard to cardiopulmonary resuscitation, Conrail made a conscious decision not to provide such training to its workers because of potential liability problems. Plaintiff has not demonstrated that that decision was erroneous or negligently made. In other words, outside of the interruption of the communications link, the allegedly negligent conditions created by Conrail at the time of Johns' collapse consisted in fact of the members of the work gang performing the negotiated duties of their jobs under conditions which may indeed have been difficult but which had occurred in the past and will probably occur again in the future.

From this analysis of Gottshall's claims, I arrive at the determination that the only act that plaintiff specifies as being negligent in and of itself is Conrail's taking the base station off the air for repairs without providing alternate means of communication to the work gang. While Conrail might reasonably foresee that this break in communications could prevent a call to obtain critical medical attention for a sick or injured worker, I cannot conclude that Conrail should be expected reasonably to foresee James Gottshall's reaction to the death of Richard Johns. Nor can I conclude that Conrail reasonably could foresee how the conditions of the work gang's negotiated

work duties and work environment, conditions which individually under our holding in *Holliday* would not support FELA recovery, would converge and, all together, create liability. If none of the parts alone were negligently established, it cannot be foreseeable to a reasonable employer that those parts, or any one or more of them, could combine to create liability through newly combined circumstances.

It is because of this lack of foreseeability that I cannot agree with the majority's conclusion that James Gottshall's claim falls within the contours of liability for negligent infliction of emotional distress. Under the precedents of this court, reasonable foreseeability is required to establish liability under FELA. In *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), we affirmed the entry of summary judgment in defendant's favor on the basis that the case involved nothing more than a situation in which the stresses of the job over a very short period were too much for plaintiff. *Id.* at 425. In other words, it was not foreseeable in a short period of time that these stresses might be injurious to Robert Holliday.[2] Similarly, in *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991), we specifically held that plaintiff could not recover because his emotional reaction to an accident which occurred at a distance from him was not reasonably foreseeable.

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[2] We noted in *Holliday* that we were not being "called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover." *Id.* at 427. That case has not yet been decided by this court. However, when it arrives, foreseeability under those circumstances might not be an obstacle to recovery.

> [I]t is hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a "perceived unfairness of imposing heavy and disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act."[3]

Id. at 79 (quoting *Prosser and Keeton on Torts* 361 (5th ed. 1984)). *Accord Stoklosa v. Consolidated Rail Corp.*, 864 F.2d 425 (6th Cir.1988) (plaintiff's extreme reaction to his demotion could not reasonably have been foreseen by the railroad).

In my opinion Conrail could not reasonably have foreseen that its negligence in interrupting the work gang's communication link might cause James Gottshall's severe emotional reaction to the death of Richard Johns, nor could Conrail reasonably have foreseen that individual conditions of work performance, which in themselves were not negligently instituted, might converge to create overall a situation of negligence on the part of Conrail. For these reasons, I conclude that this case does not fall within the contours of liability for negligent infliction of emotional distress as those contours have been drawn by this court. Therefore, I would affirm the district court's granting of summary judgment.

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[3] While the "remoteness" in *Outten* was physical, I find an similar "remoteness" in the present case in the relationship between the break in the communications link and the later ensuing reaction of James Gottshall to the death of Richard Johns. Remoteness is a concept that can be equally well characterized in distance, time, or ultimate consequences.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 92-1263

ALAN CARLISLE,

Appellee,

v.

CONSOLIDATED RAIL CORPORATION,

Appellant.

Appeal From The United States
District Court For The
Eastern District Of Pennsylvania
(D.C. Civil Action No. 88-8752)

Argued: September 21, 1992
Before: MANSMANN and ROTH, *Circuit Judges,*
and RESTANI, Judge, *U.S. Court of International Trade.*[1]
(Filed: March 29, 1993)

OPINION OF THE COURT

ROTH, Circuit Judge:

Alan Carlisle, a former railroad worker, sued his employer under the Federal Employers' Liability Act

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[1] Honorable Jane A. Restani, United States Court of International Trade, sitting by designation.

(FELA) for negligent infliction of emotional distress. Carlisle alleged that his employer, Consolidated Rail Corporation ("Conrail"), breached its duty to provide a safe workplace by requiring him to work under unreasonably stressful and dangerous conditions, which resulted in foreseeable injuries to his health. At trial, the jury returned a verdict in favor of Carlisle, awarding him $386,500 in damages. Conrail moved for judgment n.o.v., alleging that the facts submitted to the jury were legally insufficient to support the verdict, and moved, in the alternative, for a new trial based on alleged trial errors. Conrail now appeals from an order of the district court, 790 F.Supp. 521, denying Conrail's post-trial motions. For the reasons discussed below, we will affirm.

I.

Alan Carlisle started working on the railroad in 1973 as a ticket agent for the Reading Railroad, rising rapidly to positions as a tower man, a block operator, and finally a train dispatcher. Carlisle worked for Conrail from its formation in 1976 until 1988, first as a train dispatcher and later as a supervisor of all rail operations in the Philadelphia area. Train dispatchers and their supervisors are responsible for the safe movement of trains carrying passengers, freight and hazardous materials.

Beginning in 1984, Conrail sharply reduced its workforce, which, in combination with the risks presented by the company's aging railstock and outdated switching equipment, increased the stress and responsibility of dispatchers' and supervisors' jobs. As a dispatcher, Carlisle

was under constant pressure to achieve on-time performance for the trains. Carlisle testified at trial that he was made increasingly anxious by Conrail's repeated instructions to ignore safety concerns, such as malfunctioning equipment or poor maintenance, that would have slowed the movement of trains.

In 1988, Carlisle was moved to a trainmaster position in the South Philadelphia yards, which required him to work long and erratic hours as a troubleshooter, often in dangerous areas. Despite the new job assignment, Carlisle also continued to work occasionally as a supervisor and dispatcher, retaining many of the job responsibilities of his earlier position. Conrail had cut the number of people staffing each shift from eleven to four, requiring most employees in Conrail's dispatching office to double up on responsibilities. Carlisle testified at trial that, as a result of being overworked and burdened with both excessive responsibility and an abusive, alcoholic supervisor in the South Philadelphia yards, he experienced insomnia, fatigue, headaches, depression, sleepwalking and substantial weight-loss. Carlisle testified further that, as a result of being made to work 12 to 15 hour shifts for 15 consecutive days in August, 1988, his stress-related problems finally culminated in a nervous breakdown. At trial, Carlisle put on testimony by an expert on emotional stress who stated that Carlisle had suffered a bout of major depression and was disabled from returning to his job as a train dispatcher. Carlisle never returned to work for Conrail, choosing instead to pursue new careers first as a real estate agent and then as a secondary-school teacher.

Carlisle introduced evidence showing that his emotional and physical injuries were a foreseeable result of his working conditions. Over defendant's objection, the court admitted into evidence a series of depositions, taken in a separate case,[2] in which Carlisle's co-workers and subordinates testified that their jobs as dispatchers and supervisors in the Philadelphia Conrail offices had caused them to suffer cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia. Carlisle testified that the train dispatchers he supervised often complained about Conrail's outdated equipment and about the long hours and high level of stress in their jobs; Carlisle, in turn, passed on their complaints to his supervisors and added his own concerns about the excessive hours and stress of his job. He received no response to these complaints.

The trial court also admitted into evidence two reports from the Federal Railway Administration, one that documented the stressful nature of a train dispatcher's job and one that criticized the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office.

II.

Carlisle brought this action in federal district court under the FELA, 45 U.S.C. §§ 51-60 (1988). This appeal is

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[2] *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), *appeal dismissed*, 899 F.2d 1360 (3d Cir.1990).

taken from a final order of the district court and thus this Court's jurisdiction rests on 28 U.S.C. § 1291 (1988).

Conrail appeals the denial of its motion for a judgment notwithstanding the verdict on the grounds that Carlisle presented facts that were legally insufficient to support recovery under the FELA for injuries resulting from negligent infliction of emotional distress. Conrail also appeals the denial of its motion for a new trial, alleging a variety of trial errors. We will first consider the district court's interpretation and application of the law regarding the FELA and then consider Conrail's allegations of trial error.[3]

Our review of the district court's interpretation and application of legal precedent governing FELA liability for emotional injury is plenary. *Dent v. Cunningham*, 786 F.2d 173, 175 (3d Cir.1986). Our review of findings of fact by the district court follows a clearly erroneous standard. *Leeper v. United States*, 756 F.2d 300, 308 (3d Cir.1985). Our review of the district court's rulings on the relevance and admissibility of evidence follows an abuse of discretion standard. *United States v. Driggs*, 823 F.2d 52, 54 (3d Cir.1987).

Conrail claims that this Court's precedent does not allow recovery for job stress-related injuries absent a precipitating accident causing injury or fright. At the time

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[3] We find to be without merit and consequently will not discuss Conrail's allegations of error by the trial court in its failure to instruct the jury on the proper legal standards of FELA jurisprudence, its failure to instruct on contributory negligence, and its failure to grant a new trial because of prejudicial remarks made by plaintiff's counsel.

of trial, this Court had never upheld a claim under the FELA for injuries absent these factors. Yet, such cases explicitly were decided on a case-by-case, fact-specific basis and held open the possibility of recovery. Indeed, since Carlisle's trial we have expanded the basis for recovery under the FELA. In *Gottshall v. Consolidated Rail Corp.*, No. 91- 1926, ___ F.2d ___ (3d Cir. Feb. 8, 1993), we upheld a claim for negligent infliction of emotional distress under the FELA, but under factual conditions quite different from this case. On the facts of this case, we will affirm for the first time the grant of damages under the FELA for negligent infliction of emotional distress for work stress-related injuries. This holding rests on evidence admitted at trial which reasonably supports a finding by the jury that Conrail breached its well-established duty under the FELA to provide a safe workplace, that such injuries were the foreseeable result of Conrail's negligence, and that Carlisle's demanding and dangerous workplace caused his emotional and physical injuries.

A. Current FELA Jurisprudence

Congress enacted the FELA in 1908 to provide compensation for railway employees suffering job-related injuries caused by the negligence of their employer. The FELA, as codified, provides that every railroad "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . resulting in whole or in part from the negligence of [the railroad]." 45 U.S.C. § 51. As stated by the Supreme Court: "We have recognized generally that the FELA is a broad remedial statute, and have adopted a 'standard of liberal construction in order to accomplish [Congress'] objectives.' " *Atchison, Topeka &*

Santa Fe Ry. Co. v. Buell, 480 U.S. 557, 562, 107 S.Ct. 1410, 1414, 94 L.Ed.2d 563 (1987) (citation omitted). Thus, an employee can recover under the FELA as long as the employer's negligence "played any part, even the slightest, in producing the injury or death for which damages are sought." *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500, 506, 77 S.Ct. 443, 448, 1 L.Ed.2d 493 (1957); *Pehowic v. Erie Lackawanna R.R. Co.*, 430 F.2d 697, 699 (3d Cir.1970) (quoting *Rogers*). The FELA imposes on railroads a clear duty to provide their employees with a safe workplace. *Sano v. Pennsylvania R.R. Co.*, 282 F.2d 936, 937 (3d Cir.1960).

In deciding which injuries are compensable under the statute, FELA jurisprudence "gleans guidance from common-law developments." *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417. However, determining the scope of FELA liability is distinctly "a federal question, not varying in accordance with the differing conceptions of negligence applicable under state and local laws. . . . " *Urie v. Thompson*, 337 U.S. 163, 174, 69 S.Ct. 1018, 1027, 93 L.Ed. 1282 (1949). While the tort of negligent infliction of emotional distress was unknown in 1908, mental distress law has evolved to the point where all states have recognized the tort, but with a wide array of threshold tests and limitations. An American Law Reports annotation noted many years ago that "[t]he case law in the field [of emotional distress] is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarrassed complexity."[4] This wide divergence among states in their

[4] Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences, in the Absence of Impact or Other Actionable Wrong*, 64 A.L.R.2d 100, 103 (1959) (footnotes omitted).

doctrinal approach to recovery for emotional injury continues to this day.[5]

In *Buell*, the Supreme Court declined to decide whether wholly emotional injuries arising from work conditions were compensable under the FELA, partly because of the inadequacy of the record in that case, but also because of the broad divergence among the states in their standards for recovery for negligent infliction of emotional distress. The *Buell* Court noted the striking doctrinal divergences between states in the area and concluded:

> [T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive "yes" or "no" answer. As in other areas of the law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand.

Id. 480 U.S. at 570, 107 S.Ct. at 1418. Following the Supreme Court's ruling in *Buell*, the federal courts of appeals have engaged in case-by-case determinations of the proper standards for recovery under the FELA in cases involving claims for negligent infliction of emotional distress.

Four basic common law standards have been adopted by the states for testing the genuineness of claims arising

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[5] *See* Douglas Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 **Vill. L. Rev.** 781 (1988).

from negligently inflicted emotional injuries: the "physical impact" test (recovery only where plaintiff's emotional injury is incidental to physical contact); the "zone of danger" test (recovery absent contact allowed when emotional injury arises from plaintiff being threatened with physical harm); the "physical manifestation" test (plaintiff's emotional injury must cause some physical injury); and the "relative bystander" test (plaintiff must witness injury to a close relative).[6]

These doctrines have been adopted due to the courts' suspicion that emotional distress claims are often subject to fraud and exaggeration. See Restatement (Second) of Torts § 436A cmt. b (1965) (detailing concerns that emotional injury claims are often trivial, falsified and unforeseeable). The central purpose of the four standards is to screen possibly fraudulent claims for emotional injury by requiring some external indicia of the genuineness of the harm suffered. This Court has repeatedly noted its concerns about the potential for a flood of litigation, unlimited damages and fraud arising from unrestrained emotional distress claims. *See, e.g., Outten v. National R.R. Passenger Corp.*, 928 F.2d 74, 79 (3d Cir.1991); *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421, 424 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991).

However, an important tension exists between courts' concerns about excessive, frivolous litigation, the common law standards employed by the courts to curb

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[6] *See generally* Peter Bell, *The Bell Tolls: Toward Full Tort Recovery for Psychic Injury*, 36 **U. Fla. L. Rev.** 333 (1984); Marlowe, Comment, 33 **Vill. L. Rev.** 781 (1988).

such claims, and the broad remedial purposes of the FELA. As noted by the *Buell* Court, "[a] primary purpose of the Act was to eliminate a number of traditional defenses to tort liability and to facilitate recovery in meritorious cases." 480 U.S. at 561, 107 S.Ct. at 1413. The Supreme Court has also held that "Congress did not intend to create a static remedy, but one which would be developed and enlarged to meet the changing conditions and changing concepts of industry's duty towards its workers." *Kernan v. American Dredging Co.*, 355 U.S. 426, 432, 78 S.Ct. 394, 398, 2 L.Ed.2d 382 (1958). Thus, Congress' express intent in creating the FELA and the Supreme Court's consistent interpretation of the statute require us to reconcile the FELA's mandate to expand recovery standards with the courts' reasonable concerns about the potential for a flood of baseless litigation.

In our recent opinion in *Gottshall*, we reviewed closely the recent decisions of the other circuits since *Buell*. ___ F.2d at ___, ___. Rather than repeating that effort here, we will note that only the Seventh Circuit has firmly decided this issue since *Buell*, reaffirming its earlier holding that purely emotional injuries are not compensable under the FELA, while the Ninth Circuit continues to operate under a pre-*Buell* holding allowing full recovery under the FELA for emotional injuries. *See Ray v. Consolidated Rail Corp.*, 938 F.2d 704 (7th Cir.1991), cert. denied, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992); *Taylor v. Burlington N.R.R.*, 787 F.2d 1309, 1313 (9th Cir.1986); *Pierce v. Southern Pac. Transp. Co.*, 823 F.2d 1366, 1372 n. 2 (9th Cir.1987). The First, Fourth, Fifth and Sixth

circuits have declined to decide whether emotional injuries without a precipitating injury or accident are compensable under the FELA, ruling in each case that the plaintiff failed to make a requisite threshold showing. *See Moody v. Maine Cent. R.R.*, 823 F.2d 693 (1st Cir.1987); *Elliott v. Norfolk & Western Ry.*, 910 F.2d 1224 (4th Cir.1990); *Plaisance v. Texaco*, 966 F.2d 166 (5th Cir.1992) (en banc)[7]; *Adams v. CSX Transp., Inc.*, 899 F.2d 536 (6th Cir.1990). Thus, as we concluded in *Gottshall*, a "review of the decisions in other circuits in the wake of *Buell* indicates that there is no common discernable principle, test, view or attitude." ___ F.2d at ___, ___.

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[7] The district court in the present case explicitly adopted the "full recovery" rule as formulated by the Fifth Circuit in *Plaisance v. Texaco*, 937 F.2d 1004 (5th Cir.1991), allowing recovery under the FELA for negligently inflicted emotional distress where the normal showings of duty, breach, causation and foreseeability are met. However, following a recent en banc rehearing, the Fifth Circuit held that the facts of *Plaisance* "make it unnecessary for us to decide whether the Jones Act [and FELA, its underlying statute] permit[ ] recovery for purely emotional injuries." *Plaisance v. Texaco*, 966 F.2d 166, 167 (5th Cir.1992) (en banc). The en banc opinion emphasized that the Fifth Circuit's earlier holding in *Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir.1989) "continues to represent the law of this circuit." *Id.* at 169. *Gaston* rejected recovery under the bystander test, which "implicitly foreclosed recovery under any less exacting model, such as a full recovery theory." *Id.* Thus, the revised *Plaisance* opinion strongly suggests that the Fifth Circuit will join the Seventh in rejecting FELA recovery for emotional injuries without actual or threatened physical impact.

B. Third Circuit FELA Precedent

In two recent cases, this circuit has also declined to decide definitively whether the FELA permits recovery for injuries without physical contact or fear of contact, deciding such cases instead on a fact-specific basis. See *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991); *Outten v. National R.R. Passenger Corp.*, 928 F.2d 74 (3d Cir.1991). However, in our most recent case in this field, *Gottshall v. Consolidated Rail Corp.*, ___ F.2d ___ (3d Cir.1993), this Court for the first time upheld recovery under the FELA for negligent infliction of emotional distress without proof of any physical impact, under circumstances where the emotional distress was accompanied by physical manifestations. Moreover, because the district courts of this circuit have rendered conflicting opinions on this topic, we see a heightened need for clear direction from this circuit and, ultimately, the Supreme Court.[8]

Appellant claims that in order to sustain a cause of action under the FELA for negligent infliction of emotional distress, plaintiff "was required to prove that there was an accident, physical impact or injury to someone. . . . [A]n employee, like Carlisle, who allegedly suffers from stress-related injuries or illnesses caused by his general working conditions, fails to state a claim

[8] Given the conflicts among the circuits, Justices White and Thomas have stated their belief that "a uniform rule should be announced by th[e Supreme] Court on this important and recurring issue." *Ray v. Consolidated Rail Corp.*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992).

under the F.E.L.A." Appellant's Brief at 11-12. Appellant relies heavily on a district court decision which rejected similar work-related stress claims filed by Carlisle's co-workers. *See Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073, 1090 (E.D.Pa.1989), *appeal dismissed on procedural grounds*, 899 F.2d 1360 (3d Cir.1990). In *Kraus*, four Conrail train dispatchers alleged emotional and physical injuries, including heart attacks, ulcers and nervous breakdowns, arising from their stressful work environment. Noting that the common law in this area is "less than clearly defined and in a stage of rapid evolution," the *Kraus* court concluded that most state and federal cases have required allegations of specific physical impact on the plaintiff or third parties, and thus held that "[j]ob-related stress is simply not the type of problem intended to be dealt with by the FELA." *Id.* at 1089-90 (relying on Marlowe, Comment, 33 Vill. L. Rev. 781 (1988)).

We disagree. The Supreme Court has held that "[t]he wording [of the FELA] was not restrictive as to . . . the particular kind of injury resulting." *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949). Under this explication of the FELA, it is becoming more and more apparent that emotional and physical injuries that are the foreseeable result of requiring workers to remain in unreasonably dangerous and stressful work conditions for significant periods of time can present a claim under the statute.

Moreover, this conclusion, that a claim for negligent infliction of emotional distress arising from work-related stress is cognizable under the FELA, is not inconsistent with our prior FELA case law. In *Holliday* and *Outten*, this

court on a case-by-case basis rejected FELA claims alleging negligent infliction of emotional distress, while refusing to foreclose the possibility of such recovery. In *Holliday*, a railroad worker allegedly suffered emotional and physical injuries because of his brief assignment to a job that he felt unqualified to perform. This Court affirmed the district court's summary judgment in favor of the railroad while stating:

> We emphasize that our opinion is narrow. We are not holding that there can never be a recovery under FELA for emotional conditions unless the employee suffers an immediate physical injury from the railroad's negligent conduct, or unless there is an accident of some kind, as we need not and do not reach that issue. Thus, our holding does not draw a "bright line" requiring a direct impact traceable to the employer's negligence before there can be a FELA recovery. We are not called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover.

914 F.2d at 426-27.

In *Outten*, we refused to permit recovery for negligent infliction of emotional distress resulting from the employee's reaction to an accident which occurred a mile from where the employee was located. The ground for our holding was that this result was not foreseeable:

> [I]t is hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away. There is a "perceived unfairness of imposing heavy and

> disproportionate financial burdens upon a defendant, whose conduct was only negligent, for consequences which appear remote from the 'wrongful' act."

928 F.2d at 79 (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 361 (5th ed.1984)).

More recently in *Gottshall*, in reversing a district court's grant of summary judgment in Conrail's favor, we held that the FELA does permit recovery for claims for emotional and physical injury arising from negligent infliction of emotional distress under some circumstances.

Thus, we now have before us the issue which was defined but not faced in *Holliday*, *Outten*, and *Gottshall*: Can protracted exposure to work-related, stressfully injurious conditions lead to liability under the FELA? Under the circumstances of this case, where the injurious result was reasonably foreseeable, we conclude that it can.

The facts of record in this case demonstrate that Conrail had ample notice of the stressful and dangerous conditions under which Carlisle was forced to work. Carlisle passed on to his supervisors the complaints of his coworkers and subordinates about outdated equipment, long hours and the high level of job-related stress. He also communicated to them his own concerns about excessive hours and the stress of his job. At trial, he introduced into evidence a series of depositions, originally taken in the *Kraus* case, in which fellow workers in the Philadelphia Conrail offices testified that their jobs as dispatchers and supervisors had caused them to suffer

cardiac arrests, nervous breakdowns, and a variety of emotional problems such as depression, paranoia and insomnia.[9] He also introduced two reports from the Federal Railway Administration ("F.R.A.") which documented the stressful nature of a train dispatcher's job and the outdated equipment and hazardous working conditions at Conrail's Philadelphia dispatching office.[10]

We conclude therefore that, when it is reasonably foreseeable that extended exposure to dangerous and stressful working conditions will cause injury to the worker, the employer may be held to be liable under the FELA for the employee's resulting injuries.[11] Specifically, under the facts of this case, we find that Carlisle presented sufficient evidence concerning (1) Conrail's duty to provide him with a safe workplace; (2) prior notice to

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[9] We agree with the district court's determination that these depositions were admissible for the purpose of showing the foreseeability of Carlisle's injury by establishing that Conrail had adequate notice of the stressful conditions of Carlisle's job and of the possible emotional and physical injuries that might result.

[10] We also agree with the district court that these reports were admissible to show foreseeability and notice to Conrail. The district court properly concluded that introduction of these reports was not prohibited under 45 U.S.C. § 41 because this evidentiary prohibition applies to F.R.A. reports investigating the causes of specific accidents, rather than the type of general safety conditions report in question here. *Carlisle*, 790 F.Supp. at 532.

[11] The injury here to Carlisle was emotional, accompanied by obvious physical manifestations. We do not face and do not decide the issue of whether purely emotional injury, caused by extended exposure to stressful, dangerous working conditions, would be compensable under the FELA.

Conrail, through the FRA reports and stress-related injuries to Carlisle's co-workers, making Carlisle's injury foreseeable to Conrail; (3) Conrail's breach of that duty through the hazardous conditions and demands of Carlisle's job; and, (4) causation of Carlisle's injuries by the demands of an unreasonably unsafe and stressful work environment.

III.

In this case, we uphold for the first time a claim under the FELA for negligent infliction of emotional distress arising from work-related stress. We reaffirm our holding in *Gottshall* that this Court adopts no single common law standard for weighing the genuineness of emotional injury claims. Rather, courts of this circuit should engage in an initial review of the factual indicia of the genuineness of a claim, taking into account broadly used common law standards, then should apply the traditional negligence elements of duty, foreseeability, breach, and causation in weighing the merits of that claim.

Since 1908, when the FELA was adopted, the common law has evolved to where previously unknown claims for emotional injury are now broadly recognized. As medical science has also progressed, many courts have abandoned earlier common law standards used to screen claims, relying instead on expert testimony and a wider range of factual evidence to evaluate claims. Here, the evidence shows that Conrail drove its train dispatchers to work under highly stressful working conditions for long periods of time, knew of the potentially harmful effects of these conditions on Carlisle and his co-workers, and did

nothing to alleviate them, causing a serious injury to Carlisle. The fact that Carlisle's injury, both emotional and physical, arose from work-related stress is no bar to recovery under the FELA as long as there is sufficient convincing evidence of the foreseeability of the result, of the causal nexus, and of the genuineness of his claim.

We will affirm the district court's denial of Conrail's motions for judgment n.o.v. or in the alternative for a new trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JAMES E. GOTTSHALL,

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civ. A. No. 89-3102

September 30, 1991

MEMORANDUM AND ORDER

DITTER, District Judge.

In this Federal Employers' Liability Act case, plaintiff seeks damages for the emotional distress he suffered as a result of a co-worker's death. His employer, the defendant, Consolidated Rail Corporation, moves for summary judgment. After considering the record, both parties' briefs, and oral argument, I will grant the motion.

I. BACKGROUND

On August 10, 1988, plaintiff, James E. Gottshall, was replacing defective railroad track with seven other Conrail employees near Watsontown, Pennsylvania. The day was extremely humid and the temperature exceeded ninety degrees.

Replacing rails is hard physical labor, especially during hot weather. Moreover, on this day the group was

under time pressure. For various reasons, the most strenuous activity did not begin until after noon, and supervisors instructed the group to finish the assignment by the end of the day.

In addition, these workers were mostly older. One man had previously suffered a heart attack and another a stroke. Conrail knew these facts and provided water at the work site, but discouraged the workers from taking frequent breaks because of the time pressure.

At about 2:45 P.M., Mr. Gottshall saw Richard Johns, a coworker and longtime friend, fall over. When workers reached Mr. Johns to assist him, they saw he was conscious. Someone gave Mr. Johns a cold compress and within five minutes, Mr. Johns was revived. The supervisor ordered the group back to work, and the employees complied without objecting. Mr. Johns continued to rest.

Five minutes later, Mr. Gottshall saw Mr. Johns fall again. Mr. Gottshall rushed to Mr. Johns and found him lying face down, turning white. Mr. Johns was not breathing, his heart was fluttering ever faster, his eyes were rolled back, and he was drooling. Mr. Gottshall began cardiopulmonary resuscitation ("CPR") on Mr. Johns, and was able to start Mr. Johns' heart momentarily. Mr. Gottshall continued his efforts until paramedics arrived.

In the meantime, Michael Norvick, Conrail's track supervisor, attempted to contact medical help. Conrail's standard procedure was to clear a radio channel and contact a dispatcher. At that moment, however, Conrail was repairing an intermediary radio base. Because the base was necessary for contacting emergency services, Norvick's radio was useless. Realizing that obtaining

medical assistance from the worksite would be impossible, Norvick left in his car to summon help. Just before he reached a telephone, he was able to contact the emergency personnel by radio. He met them and lead them back to the worksite. This process took any where from thirty minutes to an hour.

When the paramedics arrived, Mr. Gottshall was performing CPR on Mr. Johns. Mr. Gottshall convinced the paramedics to use electric shock to revive Mr. Johns, but the efforts were unsuccessful. Ultimately, the paramedics decided they could do no more. They called the coroner and told the workers not to move the body before the coroner had examined it. The paramedics also directed everyone to remain at the scene until the coroner arrived.

From the outset, Mr. Johns death affected Mr. Gottshall. Other workers noticed he was emotional and upset during the incident.

Mr. Gottshall worked for the next four days, but was afraid he might suffer the same fate as Mr. Johns. Over the weekend, Mr. Gottshall felt ill. He lost his appetite, and though he was able to return to work on the following Tuesday, he went home early. Mr. Gottshall withdrew to his basement and his father eventually found him there a few days later. On August 27, 1988, Mr. Gottshall was admitted to the Northwestern Institute of Psychiatry.

At Northwestern, Mr. Gottshall was diagnosed as having depression and post-traumatic stress disorder with symptoms that included suicidal preoccupation, anxiety, sleep onset insomnia, cold sweats, repetitive nightmares, and weight loss. Another doctor identified

various emotional disorders in Mr. Gottshall, and connected them to the incident.

Mr. Gottshall sued Conrail for negligent infliction of emotional distress.

II. ANALYSIS

Summary judgment is appropriate where there are no genuine issues of material fact, and the moving party is entitled to a decision as a matter of law. An issue is genuine if a reasonable fact finder considering the evidence presented could find for the non-moving party. In deciding a summary judgment motion, I must view all facts in favor of the non-moving party.

With these principles in mind, I will address the merits of this case.

A. Emotional Injuries Under the FELA.

In *Atchison, Topeka, and Santa Fe Ry. Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987), the Supreme Court refused to make a blanket rule governing emotional injuries under FELA. Rather, the court explained how "FELA jurisprudence gleans guidance from common-law developments," *id* at 568, 107 S.Ct. at 1417, and how there was little agreement among the various jurisdictions concerning emotional injury suits. The court concluded an *ad hoc* analysis was appropriate because recovery "could rest on a variety of subtle and intricate distinctions related to the nature of the injury and the character of the tortious activity." *Id.*

The court, however, clearly indicated that Congress intended FELA as a broad remedy to ensure railroad workplace safety, and "adopted a standard of liberal construction in order to accomplish Congress' objects." *Id.* at 562, 107 S.Ct. at 1414.

The Third Circuit discussed emotional injuries under the FELA in two recent cases. *See Outten v. National Railroad Passenger Corporation*, 928 F.2d 74 (3d Cir.1991); *Holliday v. Consolidated Rail Corp*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991). In both, the court applied the *Atchison* approach and found the plaintiffs had not alleged recognizable tort claims.

In *Holliday*, the plaintiff was working as a conductor before he was fully trained to do the job. The position required the deployment of various switches, and the plaintiff made frequent mistakes. While the plaintiff did not cause any accidents, in one case, he almost crushed himself. Because of these errors, the plaintiff suffered acute stress and eventually developed severe physical symptoms. These problems forced him to stop working, and he sued the railroad under FELA. The district court granted summary judgment to the railroad.

The court of appeals affirmed noting that no recognized tort theory supported recovery. Judge Greenburg wrote every job creates stress, and that even under FELA's liberal standards, the plaintiff's injury was not compensable.

In *Outten*, a railroad employee mistakenly switched a train down the track where the plaintiff was working. Fearing a collision with electrical equipment on the track,

the plaintiff fled for his life. Actually, the equipment was a mile down the rail, and the plaintiff was not hurt. After the incident, though, the plaintiff suffered psychological injuries and sued for negligent infliction of emotional distress.

Emphasizing FELA's broad, remedial purpose, the court applied Pennsylvania's relatively lenient bystander law. Despite this liberal test, the Third Circuit denied the plaintiff's claim because he could not have been physically hurt under the circumstances. In addition, the court also noted the plaintiff's injury was not foreseeable.

These cases make my inquiry clear. First, I must decide whether the events that caused Mr. Gottshall's injury show there was a breach of duty under common law that would support a claim for the negligent infliction of emotional damage. Second, I must inquire whether Mr. Gottshall can show the other basic elements of a tort claim: foreseeability, actual cause, proximate cause, and damages.

Mr. Gottshall cannot succeed at either step. First, his circumstances do not satisfy even the most liberal requirements for a negligent infliction of emotional damages claim. Second, Mr. Gottshall cannot show his injury was foreseeable and he cannot show actual or proximate cause.

1. *Negligent Infliction of Emotional Injury.*

As the *Outten* court noted, there are fairly strict limits on claims for negligent infliction of emotional injury.

Some states require a contemporaneous physical injury before there can be recovery for an emotional injury. Here, Mr. Gottshall has made no such allegation. Other states employ the zone of danger concept. *Dillon v. Legg*, 68 Cal.2d 728, 69 Cal.Rptr. 72, 441 P.2d 912 (1968), the seminal case in this area, held there is a duty to a bystander if he was located near enough to the accident, was closely related to the victim, actually witnessed the event, and this experience injured him.

Dillon is inapplicable here because Mr. Gottshall and Mr. Johns were not related, but other tests are less strict. Pennsylvania's zone of danger test is among the least restrictive. It requires a negligent force that was aimed at the plaintiff and put him in fear and danger of physical impact. *See Niederman v. Brodsky*, 436 Pa. 401, 261 A.2d 84, 90 (1970). I will use the *Niederman* test here keeping in mind FELA's broad, remedial aims.

Applying this relatively liberal standard to the instant facts shows there is no liability.

At first glance, there is intuitive merit to the idea that Conrail negligently put Mr. Gottshall in danger. The men in the work gang were mostly older, at least two had a history of illness, the weather was extraordinarily hot and humid, and defendant clearly asked the men to perform very strenuous labor at a heightened pace. In some ways, there is no surprise that one of the workers became ill.

Nevertheless, drawing the zone of danger with such a generous negligence standard would indiscriminately sweep in countless workers. Under Mr. Gottshall's theory, every older Conrail employee who worked outside on

August 10, 1988, would satisfy the first requirement in the zone of danger test. For that matter, any company that asks its workers to work hard during any extreme weather conditions automatically would be held to have conceded the first element in the zone of danger test.

Such a result is simply bad law. Directing employees to perform necessary work, even though it is physically demanding and the weather is adverse, does not constitute negligence. Of course, negligence may exist if an employer does not take reasonable efforts to guard its workers against the risks of working under adverse conditions. Here, Conrail provided plenty of drinking water, and while the supervisors might have discouraged work and water breaks, no one forbade an employee's resting when he felt it necessary to do so.

The radio breakdown remains, though. Having employees work in a remote location without emergency communication raises a variety of issues, and in this case, the defendant violated its own standard of care.

Normally, Conrail employees who need emergency assistance can clear a channel on the railroad radio line. When Mr. Johns fell ill, Mr. Norvick followed procedure but was unable to summon help. He explained the intermediate communication base was under repair when he initiated his call. A technician had taken apart the computer without announcing the corresponding interruption in service. Essentially, defendant shut down its emergency system without telling anyone about it.

Even assuming the radio failure constituted negligence, Mr. Gottshall cannot show he was in the zone of danger. *Niederman* presents a two pronged test, and the

record shows Mr. Gottshall cannot satisfy its requirements.

Mr. Gottshall has alleged that before Mr. Johns became ill, there was a negligent force, the inoperable radio. For this period, however, Mr. Gottshall has not alleged fear. Furthermore, under the circumstances he could not possibly show he feared the lack of communication because the problem was not apparent until Mr. John's collapsed. Therefore, for the period before Mr. John's collapse, Mr. Gottshall can only show the first *Niederman* requirement.

Mr. Gottshall worked the day after the accident, and he claims he was afraid of having a heart attack and dying on the job. According to his testimony, this is the first time his fear appeared. Mr. Gottshall does not allege, let alone show, the radio problem continued after the accident. In fact, there is uncontradicted evidence to the contrary. Mr. Norvick testified he contacted a dispatcher on the radio while he was driving to get help.[1]

For this period, then, Mr. Gottshall can show the second *Niederman* requirement – fear – but he fails to allege the continued existence of a negligent force. In short, when Mr. Gottshall was subjected to the negligent force, he did not fear it would affect him – and by the time Mr. Gottshall feared he might have a heart attack and die on the job, the negligent force had ceased to exist.

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[1] Mr. Gottshall might have claimed Conrail had a policy of repairing its radio system without notice and that the negligent policy continued after the accident. This argument might satisfy the first *Niederman* requirement after Mr. Johns' death, but Mr. Gottshall never made this claim, and offers no evidence on it.

Since he cannot satisfy the liberal requirements of *Niederman* by showing the coexistence of danger and fear, Mr. Gottshall cannot show Conrail breached its duty to him.

B. The Other Elements of a Tort Claim.

Mr. Gottshall, however, maintains this is not a zone of danger case. Rather, he argues the entire chain of events reveals defendant negligently failed to provide a safe working environment for its employees. Mr. Gottshall claims this behavior violated FELA.[2]

Assuming for the moment that Mr. Gottshall's characterization of the case is correct, his claim still fails because he cannot satisfy other requirements of a tort claim.

1. *Foreseeability*.

As I have pointed out, the first necessary element in any negligence claim is the existence of a duty. However, there is not an unlimited duty to every possible plaintiff

[2] Even this characterization of the case creates insurmountable problems for Mr. Gottshall. In *Holliday*, Judge Greenburg wrote that all jobs create stress, and that stress resulting from ordinary management decisions could not support a FELA claim. *See Holliday*, 914 F.2d at 425. In this case, Mr. Gottshall alleges problems with the total work environment: as he puts it "the entire ordeal." Since Conrail's decision to have the employees work on August 10, 1988, was not negligent, I consider it an ordinary management decision. Therefore, Mr. Gottshall's claim fails under *Holliday* because his injury was the result of an ordinary management decision.

on every possible claim. Instead, the scope of an actor's duty is limited to reasonably foreseeable risks under the circumstances. As a Pennsylvania appeals court wrote, "[t]he wrongful actions of a third party are not deemed to be foreseeable simply because the defendant could have speculated that they might conceivably occur." *Mathis v. United Engineers and Constructors, Inc.*, 381 Pa.Super. 466, 554 A.2d 96 (1989).

Even assuming defendant negligently failed to provide a safe working environment on August 10, 1988, Mr. Gottshall's injury was not a foreseeable risk. Here, the only possible breach of duty was Conrail's failure to provide emergency communication to employees working in a remote area. Such a mistake portends a number of foreseeable consequences. In fact, the most tragic occurred when Mr. Johns became ill and there was a lengthy delay before medical assistance arrived. To say, however, that Mr. Gottshall's injuries were foreseeable stretches things too far.

Another railroad case, *Dobelle v. National Railroad Passenger Corp.*, 628 F.Supp. 1518 (S.D.N.Y.1986) (applying Pennsylvania's *Niederman* test), is instructive. In *Dobelle*, a rail ripped through a train car and severely injured a group of passengers. The plaintiff's physical injuries were minor, but his emotional injuries were significant.

The *Dobelle* facts reveal the critical problem with Mr. Gottshall's case. In *Dobelle*, and other emotional damages cases, the negligent force created both the physical and emotional injury. The rail crashed through the car, maimed several people, and the *Dobelle* plaintiff thought,

"I was almost killed by that rail." As a result, he became emotionally distressed.

Mr. Gottshall alleges something quite different. Even assuming negligent radio repair caused Mr. Johns' death, Mr. Gottshall himself alleges he was injured by "the entirety of the ordeal." Mr. Gottshall saw Mr. Johns die and thought, "he died under these circumstances, I could too."

This situation is different from *Dobelle* where the rail was the result of the negligent conduct, the creator of the damage, and the stimulus for the emotional injury. Here, the inability to summon help was the result of the negligent conduct and is assumed to be the cause of Mr. Johns' death, but "the entire ordeal" was the stimulus for Mr. Gottshall's emotional injury. Although the communication breakdown is a common element, the cause of Mr. Johns' physical injuries and the cause of Mr. Gottshall's emotional injuries are different.

Since Mr. Gottshall cannot directly trace his emotional injuries to the negligence, his injury was not foreseeable.[3]

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[3] Plaintiff's reliance on *Althoff v. Consolidated Rail Corp.*, No. 87-4384, slip op., 1988 WL 61734 (E.D.Pa. June 13, 1988), is also misplaced. In *Althoff*, the plaintiff was actually operating the crane which caused the accident: he unleashed the negligent force. This fact led Judge Gawthrop to conclude there was a greater chance the plaintiff would suffer emotional harm. In this case, plaintiff was not unleashing the negligent force. Actually, if anything, he was a mitigating factor. As a result, plaintiff was not an "active participant" in the *Althoff* sense.

To hold otherwise would mean the defendant should have anticipated that by negligently repairing its radio, a man might have died in his friend's arms, and the friend would suffer significant emotional injuries. Such an attenuated sequence of events cannot be a foreseeable consequence.

2. *Causation.*

a. *Cause in fact.*

Mr. Gottshall also has a cause in fact problem which creates a deficiency like the one in *Outten*. Mr. Gottshall did not show Conrail's negligent act concerning the radio injured him by causing Mr. John's death.

There is simply no evidence that a faster emergency response could have saved Mr. Johns. Mr. Johns might have died if the paramedics had reached him more quickly; he might have died even if he had suffered the heart attack in a hospital.

In *Outten*, even though the wayward train actually frightened the plaintiff, the resulting crash could not have hurt him – he was a mile away from the accident. The court concluded plaintiff was out of the zone of danger because he was unable to show the negligence could hurt him.

Mr. Gottshall's position is similar. Because he cannot show the weather or the communication breakdown caused an injury that could harm him, he cannot show he was in a zone of danger. As in *Outten*, summary judgment is appropriate.

b. *Proximate cause.*

Finally, Mr. Gottshall's case poses a proximate or legal cause problem. A recent Pennsylvania Superior Court decision describes the concept:

> Even where harm to a particular plaintiff may be reasonably foreseeable from the defendant's conduct, and that conduct is the cause-in-fact of the plaintiff's harm, the law makes a determination that, at some point along the causal chain, liability will be limited. The term "proximate cause" or "legal cause" is applied by courts to those considerations which limit liability, even where the fact of causation can be demonstrated. Because of convenience, public policy, or a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point, as no longer a "proximate" or "legal" consequence naturally flowing from the wrongdoer's conduct. To put it simply, at a certain point, negligent conduct will viewed as too remote from the harm arising to the plaintiff, and thus not a substantial factor in bringing about the plaintiff's harm. *Alumni Association, Delta Zeta Zeta of Lambda Chi Alpha Fraternity v. Sullivan*, 369 Pa.Super. 596, 535 A.2d 1095, 1098 (1987).

In this case, both public policy and a rough sense of justice compel me to conclude Mr. Gottshall cannot show proximate cause. Mr. Gottshall's injury was just too far down the causal chain, and as a result linking defendant's negligence to the harm treats the defendant like an insurer.

It is one thing to hold employers liable for the direct consequences of specific, negligent acts. It is quite another to enforce liability when one negligent act causes a chain of events, and someone is injured down the road. In this case, Conrail created the communication problem, but it is not responsible for every consequence of the ensuing ordeal.

III. CONCLUSION

This accident was obviously a tragedy for everyone involved, and under different circumstances, another outcome might be appropriate. For the foregoing reasons, though, I find FELA does not provide a remedy for Mr. Gottshall's emotional injuries.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE,

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civ. A. No. 88-8752.
July 31, 1990

MEMORANDUM AND ORDER

GAWTHROP, District Judge.

Plaintiff, Alan Carlisle, instituted this suit under the Federal Employee's Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), against his former employer, Consolidated Rail Corporation ("Conrail"), alleging that stressful working conditions at Conrail caused him to suffer from depression, insomnia, and sleepwalking. Conrail has moved for summary judgment, claiming that Mr. Carlisle has not stated a claim cognizable under the FELA. For the reasons stated in this memorandum, I will deny Conrail's motion.

BACKGROUND

Mr. Carlisle began working for Conrail in 1973. He contends that, in 1983, his train dispatching duties began to include increased paperwork, computer-work, telephone communicating, and responsibility for moving

trains. Despite lodging numerous complaints with Conrail officials, he claims that work conditions continued to worsen to the point where in 1988, he was working 14-15 hour days, without any breaks for lunch or relaxation, seven days a week. He further contends that he was pressured by Conrail officials into writing false reports concerning Conrail's adherence to safety standards. Mr. Carlisle's complaint alleges that his increased workload caused him to live in fear of causing a tragic accident, and that as a result, he was forced to quit his job. He claims that at the time he terminated his employment, in 1988, he suffered from insomnia, sleep-walking, anxiety, paranoia, disorientation, and depression, and was on the verge of a nervous breakdown.

Mr. Carlisle has submitted the affidavits of five train dispatchers who worked with him at Conrail. Those affidavits support Mr. Carlisle's contentions that working conditions at Conrail during Mr. Carlisle's employment included long hours, few days off, few breaks, and extreme pressure to perform safely a dangerous job.[1] Mr. Carlisle has also submitted the affidavit of his replacement at Conrail, which alleges that stressful working conditions caused him to have a nervous breakdown seven months after taking over Mr. Carlisle's job.

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[1] Six of Mr. Carlisle's co-workers at Conrail have also instituted suits against Conrail, alleging that work-related stress at Conrail has caused them to suffer injuries which are compensable under the FELA, including heart attacks, depression, ulcers and nervous breakdowns.

DISCUSSION

The FELA states that railroads engaged in interstate commerce "shall be liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51 *et seq.* In *Urie v. Thompson*, 337 U.S. 163, 181-82 (1949), the Supreme Court emphasized the breadth of the language and the coverage of this provision:

> The language is as broad as could be framed . . . The wording was not restrictive as to . . . the particular kind of injury resulting. To read into this all-inclusive wording a restriction as to . . . the particular sorts of harms inflicted would be to contradict the wording, the remedial and humanitarian purpose and the constant and established course of liberal construction of the Act followed by this Court.

Mr. Carlisle contends that his claim falls under the FELA's broad language. Conrail asserts that plaintiff's claim should be dismissed for three reasons. First, defendant contends that emotional distress claims are not cognizable under the FELA. Secondly, it asserts that a precipitating physical injury is required to state an emotional distress claim under the FELA. Lastly, it asserts that work-related stress cannot form the basis of a FELA claim.

1. *Emotional Distress Claims Under The FELA*

The threshold issue in this case is whether emotional distress claims are cognizable under the FELA.[2] In *Atchison, Topeka and Santa Fe Railroad Co. v. Buell*, 480 U.S. 557, 568 (1987), the Supreme Court stated that emotional injuries may be cognizable under the FELA, but remanded the case to the lower court for "exacting scrutiny of the facts of the case."

Hence, negligent infliction of emotional distress claims may be cognizable under the FELA, depending on the facts of the case. *See e.g. Taylor v. Burlington Northern R. Co.* 787 F.2d 1309 (9th Cir.1986) (claim for emotional injuries based on harassment at workplace cognizable under FELA); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (claim for emotional injuries based on harassment at workplace cognizable under FELA); *Althoff v. Consolidated Rail Corp.*, No. 87-4384, slip. op. (E.D.Pa. June 13, 1988) (Gawthrop, J.) (negligent infliction of emotional distress claim cognizable under the FELA in case where crane operator accidentally killed

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[2] Conrail cites numerous cases in which courts have denied recovery under FELA to plaintiffs alleging claims of intentional infliction of emotional distress. *See Netto v. Amtrak*, 863 F.2d 1210 (5th Cir.1989) (claim for intentional infliction of emotional distress not cognizable under the FELA); *Hammond v. Terminal Railroad Association of St. Louis*, 848 F.2d 95 (7th Cir.1988), *cert. denied* ___ U.S. ___, 109 S.Ct. 1170 (1989) (no claim for deliberate infliction of emotional distress under the FELA); *Adkins v. Seaboard System Railroad*, 821 F.2d 340 (6th Cir.1987), *cert. denied* ___ U.S. ___, 108 S.Ct. 452 (1987) (only negligent conduct, not intentional conduct, gives rise to a FELA claim). Mr. Carlisle's claim in this case, however, is one for negligent infliction of emotional distress.

fellow employee); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y.1987) (claim for negligent infliction of emotional distress cognizable under the FELA where job harassment caused suicide); *Gillman v. Burlington Northern Railroad*, 673 F.Supp. 913 (N.D.Ill. 1987) (employees within the zone of danger of an accident that killed fellow employee stated a claim under the FELA).

2. *Physical Injury*

Conrail asserts that a precipitating physical injury is required to state an emotional distress claim under the FELA. In *Bullard v. Central Vermont Ry.*, 565 F.2d 193 (1st Cir.1977), the First Circuit held that only emotional distress resulting from physical injury was compensable under the FELA. In *Moody v. Maine Central R.R. Co.*, 620 F.Supp. 1472, 1473 (D.Me.1984), *aff'd* 823 F.2d 693 (1st Cir.1987), the district court held that "there can be no recovery for emotional disturbance under the FELA without some precipitating physical injury." On appeal, however, the First Circuit noted that the Supreme Court's decision in *Buell* casts doubt on whether physical injury is required to state an emotional injury claim under the FELA.

"While the traditional rule was that a plaintiff could not recover for mental injuries unconnected with actual or threatened impact, the majority of jurisdictions have abandoned that rule." *Buell*, 480 U.S. at 569 n. 20. Many recent cases have allowed FELA claims for negligent infliction of emotional distress where there is no precipitating physical injury. *See e.g. Taylor v. Burlington Northern*

R. Co., 787 F.2d 1309 (9th Cir.1986) (FELA claim recognized where injury is wholly emotional); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (FELA claim recognized where there is some objective physical manifestation); *Halko v. New Jersey Transit Rail Operations Inc.*, 677 F.Supp (S.D.N.Y.1987) (FELA claim recognized where there is some objective physical manifestation).

The majority rule, today, is to allow recovery for "mental distress [when] certified by some physical injury, illness, or other objective physical manifestation." *Prosser and Keeton on Torts*, sec. 54 at 364 (5th ed. 1984). Plaintiff's allegations of insomnia and sleepwalking are, in my view, "objective physical manifestations" which satisfy the physical injury requirement for stating an emotional distress claim under the FELA.

3. *Work-Related Stress*

Conrail also contends that work-related stress cannot form the basis of a FELA claim. Defendant relies on *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), in which Conrail workers who alleged emotional distress from dangerous working conditions were held not to have a claim cognizable under the FELA. The court stated that "plaintiffs, who allegedly suffer from stress-related physical or purely emotional injuries or illnesses caused by their general working conditions, fail to state a claim under the FELA." *Id* at 1090.

However, many cases allow FELA claims based on work-related stress. In *McMillan v. Western Pacific Railroad*

Co., 357 P.2d 449 (Cal.1960), the Supreme Court of California held that a train dispatcher who suffered a nervous collapse because of stressful working conditions stated a claim cognizable under FELA. In *Barker v. Consolidated Rail Corporation*, No. 85-5304 slip op. (E.D.Pa. January 24, 1986) (Weiner J.), a case involving a train dispatcher who worked with Mr. Carlisle at Conrail, this court held that a plaintiff stated a claim under the FELA where his heart attack was allegedly induced by excessive job stress. So too, in *Welby v. Consolidated Rail Corporation*, 671 F.Supp. 1016 (M.D.Pa.1987), plaintiff's claim that his heart attack was caused by improper and unsafe working conditions stated a claim under the FELA. *See also Yawn v. Southern Ry. Co.* 591 F.2d 312 (5th Cir.1979) (employees' allegation that railroad failed to provide sufficient help and adequate time for employees to do their work stated a claim under the FELA).

There is also ample caselaw holding that a claim for negligent infliction of emotional distress based on harassment at the workplace is cognizable under the FELA. *See Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309 (9th Cir.1986) (harassment at work recognized as negligent infliction claim under the FELA); *Buell v. Atchison Topeka & Santa Fe Railway Co.*, 771 F.2d 1320 (9th Cir.1985) (harassment at work recognized as negligent infliction claim under the FELA); *Teague v. National Railroad Passenger Corp.*, 708 F.Supp. 1344 (D.Mass.1989) (embarrassment and humiliation at work recognized as negligent infliction claim under the FELA); *Halko v. New Jersey Transit Rail Operations, Inc.*, 677 F.Supp. 135 (S.D.N.Y.1987) (harassment on the job that led to suicide recognized under the FELA as a negligent infliction claim).

This court does not find a significant distinction under the FELA between work-related stress that causes a heart attack and job stress that leads to nervous conditions such as insomnia, sleepwalking, and depression. Just as work-related stress can lead to a heart attack, so too, such stress can lead to a nervous breakdown. This court sees no reason why the person who suffers a heart attack should have a claim under the FELA, while the person who has a nervous breakdown, does not.

This court also sees no difference between a negligent infliction of emotional distress claim based on harassment at the workplace, and a work-related stress claim such as Mr. Carlisle's. Harassment and job stress are similar – both may result in emotional injuries to employees, and both are often within the control of the employer. In my view, emotional injuries caused by stressful working conditions, which are accompanied by verifiable objective physical manifestations, constitute valid claims under the FELA.

CONCLUSION

Under Fed.R.Civ.P. 56(c), summary judgment will be granted only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law." The moving party bears the initial burden of demonstrating an absence of a genuine issue of material fact. *Celotex v. Catrett*, 477 U.S. 317, 322 (1986). All reasonable inferences are to be drawn

in favor of the non-moving party. *Adickes v. Kress & Co.*, 398 U.S. 144 (1970)

To create a question of fact for a jury in a negligence claim under the FELA, "the evidence may be minimal but it must be sufficient to provide the jury with some rational basis for concluding that some negligence of the railroad proximately contributed to the accident. The issue of negligence may not be submitted to the jury solely on the basis of conjecture." *Albergo v. Reading Co.*, 372 F.2d 83 (3d Cir.1966), *cert. denied* 386 U.S. 983 (1967).

In this case, where the plaintiff has alleged that stressful working conditions at Conrail have caused him to suffer emotional injuries, which are evidenced by verifiable objective physical manifestations, I conclude that there is ample rational basis for a jury to decide that Conrail's negligence caused Mr. Carlisle's injuries.

Hence, the order which follows.

ORDER

AND NOW, this 27th day of July, 1990, upon consideration of defendant Consolidated Rail Corporation's Motion for Summary Judgment, the response thereto, and oral argument, it is hereby ORDERED that the Motion is DENIED.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ALAN CARLISLE,

Plaintiff,

v.

CONSOLIDATED RAIL CORPORATION,

Defendant.

Civ. A. No. 88-8752.

March 23, 1992

MEMORANDUM AND ORDER

GAWTHROP, District Judge.

Plaintiff, Alan Carlisle, filed this suit under the Federal Employers' Liability Act, 45 U.S.C. § 51, *et seq.* ("FELA"), against Consolidated Rail Corporation ("Conrail"), his former employer, alleging negligent infliction of emotional distress. Plaintiff claimed that Conrail breached its non-delegable duty to provide him with a safe place to work by requiring him to work under unreasonably dangerous conditions, with foreseeable hazards to his health. The jury returned a verdict in favor of the plaintiff in the amount of $386,500, and Conrail now moves for judgment notwithstanding the verdict, claiming that Mr. Carlisle's evidence was not legally sufficient to present a question to the jury on the theory of negligent infliction of emotional distress under the FELA. Counsel also moves for a new trial, asserting a variety of trial errors. Upon the following reasoning, I shall deny both of defendant's motions.

DISCUSSION

I. *Motion for Judgment Notwithstanding the Verdict*

Granting a motion for judgment notwithstanding the verdict[1] is appropriate only if the trial record is "critically deficient of that minimum quantity of evidence from which a jury might reasonably afford relief." *Aloe Coal Co. v. Clark Equipment Co.*, 816 F.2d 110, 1113 (3d Cir.1987), *cert. denied*, 484 U.S. 853, 108 S.Ct. 156, 98 L.Ed.2d 111 (1987). A judgment notwithstanding the verdict should only be granted when, without weighing the evidence, there can be but one reasonable conclusion as to the proper judgment. *Marian Bank v. International Harvester Credit Corp.*, 550 F.Supp. 456, 460 (E.D.Pa.1982), *aff'd*, 725 F.2d 669 (3d Cir.1983).

Defendant contends that the plaintiff's evidence was legally insufficient to sustain a jury's verdict, under the caselaw of the Third Circuit, because the plaintiff failed to establish: 1) an accident, physical impact, or injury to someone; 2) physical injury to himself as the result of an impact; 3) his placement in a zone of danger; 4) his witness of an accident resulting in physical injury to

[1] At the time this motion was filed under Rule 50, that rule was titled "Judgment Notwithstanding the Verdict." Effective on December 1, 1991, the Rule was changed to "Judgment as a Matter of Law in Actions Tried by a Jury."

someone;[2] and 5) outrageous and unconscionable abuse directed at him.[3]

a. The law on negligent infliction of emotional distress claims under the FELA

Preliminarily, I disagree with defendant's characterizations of the law in this circuit. The Supreme Court in *Atchison, Topeka & Santa Fe Railway Co. v. Buell*, 480 U.S. 557, 107 S.Ct. 1410, 94 L.Ed.2d 563 (1987) decided that the Railway Labor Act ("RLA"), as the statute governing railway labor disputes, did not preempt an employee's FELA action seeking recovery for intentional and negligent harassment and intimidation from co-workers. In so doing, however, the Court declined to create a general rule as to whether a plaintiff can recover for purely emotional injuries under the FELA. While the court in *Buell* stated that the FELA should be liberally construed and suggested that some emotional injuries may be cognizable, *Id.* at 561-562, 107 S.Ct. at 1413-1414, it left the

[2] This refers to the "bystander cases" under FELA which have no bearing on this case. *See e.g. Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir.1989) (denied recovery for emotional injury to plaintiff as a result of seeing his half-brother crushed to death between two ships). In *Plaisance v. Texaco, Inc.*, 937 F.2d 1004 (5th Cir.1991), *reh'g granted en banc*, 954 F.2d 266 (5th Cir.1992), however, the Fifth Circuit reviewed *Gaston* and limited its impact, calling it "myopic prognostication." *Id.* at 1011 n. 8.

[3] This standard, used in claims for intentional infliction of emotional distress, is inapposite here where the plaintiff has made clear on several occasions that he is not pursuing such a claim.

issue to the circuits, to decide whether employees could recovery for emotional injuries under the FELA and, if so, under what circumstances. "[T]he question whether one can recover for emotional injury may not be susceptible to an all-inclusive 'yes' or 'no' answer. As in other areas of law, broad pronouncements in this area may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570, 107 S.Ct. at 1418.

Two circuits that have directly faced this issue have found that physical injury, physical contact, or immediate threat of physical contact is not required to prove negligent infliction of emotional distress under the FELA. *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir.1991); *Taylor v. Burlington Northern R. Co.*, 787 F.2d 1309, 1313 (9th Cir.1986). The Seventh Circuit, however, does require physical contact or the threat of physical contact before an emotional injury is cognizable under the FELA. *Ray v. Consolidate Rail Corporation*, 938 F.2d 704 (7th Cir.1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 914, 116 L.Ed.2d 813 (1992).

The two Third Circuit decisions on this issue have not directly addressed the question expressly left open by the Supreme Court in *Buell:* whether physical contact, physical injury, or the immediate threat of physical contact is a required element for a FELA action for negligent infliction of emotional distress. The Third Circuit in *Holliday v. Consolidated Rail Corp.*, 914 F.2d 421 (3d Cir.1990), *cert. denied*, ___ U.S. ___, 111 S.Ct. 970, 112 L.Ed.2d 1057 (1991), declined to allow recovery for emotional distress caused by Conrail's placement of an employee in a position for which he was not qualified, for but a few days.

Focusing on the "nature of [the plaintiff's] injury and the character of the tortious activity," *Id.* at 423, the court held that even though plaintiff's emotional injury manifested itself physically, in the form of heart palpitations, spastic colon, involuntary rectal discharge, anxiety and depression, Conrail's allegedly tortious activity of placing the plaintiff in a job for which he considered himself unqualified for a short period of only a few days was "simply an ordinary management decision." *Id.* at 425.

The court, however, was careful to limit the breadth of its holding by explicitly stating,

> We emphasize that our opinion is narrow. We are not holding that there can never be a recovery under the FELA for emotional conditions unless the employee suffers an immediate physical injury from the railroad's negligent conduct, or unless there is at least an accident of some kind, as we need not and do not reach that issue. Thus, our holding does not draw a 'bright line' requiring a direct impact traceable to the employer's negligence before there can be a FELA recovery. We are not called upon to decide whether an employee exposed to dangerous conditions for a protracted time, though not in an accident, could recover. *Id.* at 427.

The Third Circuit's most recent decision in this area is *Outten v. National Railroad Passenger Corp.*, 928 F.2d 74 (3d Cir.1991). There, the plaintiff attempted to recover from Amtrak for negligent infliction of emotional distress, claiming he fled from his job site in fear of his life, when he thought two trains would collide near him. It turned out that he was at least a full mile from the point

where the trains collided, and he had witnessed neither the initial impact nor the individual injuries.

Upon those facts, the court held that no theory permitted this particular plaintiff to recover under the FELA for his emotional injuries, noting as a Palsgrafian factor in its decision, that it was "hardly foreseeable to the railroad that one of its employees might suffer serious psychological injuries as a result of the fear of injury from a train collision over a mile away." *Id.* at 79. But in so holding, the court again limited its denial of recovery for emotional distress under the FELA to the specific facts of the case, stating that they were not "prepared to attempt to devise a litmus test for FELA claims based on negligent infliction of emotional distress that could be applied across-the-board because the Supreme Court has cautioned us to give 'exacting scrutiny to the facts of the case.'" *Id.* (quoting *Buell*, 480 U.S. at 568, 107 S.Ct. at 1417).

One court in this district has faced claims similar to the one at bar. In *Kraus v. Consolidated Rail Corp.*, 723 F.Supp. 1073 (E.D.Pa.1989), *appeal dismissed on other procedural grounds*, 899 F.2d 1360 (3d Cir.1990), Judge McGlynn granted summary judgment to Conrail on the claims of four former Conrail train dispatchers. The train dispatchers brought claims for negligent infliction of emotional distress under the FELA, alleging that they had suffered injuries, ranging from the purely emotional for one plaintiff, to the physical – a heart attack – for another. They contended that their maladies were caused by Conrail's failure to provide them with a safe place to work, and, in particular, claimed that job consolidation, work force reduction, heavy workload, intense pressure from

job responsibility, loss of lunch and rest breaks, and chaotic working conditions at Conrail caused the stress that injured them.

After a thorough review of the caselaw on recovery for emotional injuries under the FELA, as well as the law on negligent infliction of emotional distress, the court in *Kraus* decided that the plaintiffs were allegedly injured by performing the normal duties of their jobs, as structured by management and monitored by the union, and concluded that job-related stress from general working conditions is not the type of problem intended to be dealt with by the FELA. *Id.* at 1090. In its review of the caselaw on negligent infliction of emotional distress, the court found that most states combine a foreseeability analysis with some kind of physical-contact or physical-manifestation requirement. Finding that there was no allegation that any of the *Kraus* plaintiffs had suffered physical contact, the court did not analyze the aspect of foreseeability, but instead concluded that the type of conduct alleged was not the type of conduct that has "led to the evolution of the negligent infliction tort." *Id.* at 1089.

With the utmost respect for the author of that opinion and with appreciation for his scholarly analysis of the common law and the FELA cases dealing with employees' emotional injuries, I must, nevertheless, disagree with the opinion's general conclusion. I am of the view that a plaintiff who incurs stress-related emotional or physical injuries, allegedly from Conrail's negligence in requiring its employee to work under conditions that are unsafe and harmful to an employee's health, does state a cognizable claim under the FELA. In so stating, I am quick to say that I do agree that stress can be an

inevitable, daily – and non-actionable – concomitant of any job. It is only in the very most egregious circumstances, in which the psychological brutality of the conditions of the workplace has so bludgeoned the body and mind as to result in genuine debilitating physical repercussions, that a cause of action in this context should be countenanced.

At the outset, the fact that working conditions are at the "heart of labor-management negotiations" and part of a collective bargaining agreement, *Id.* at 1090, is not of dispositive consequence to the analysis of injury under the FELA. In holding that the FELA provides railway workers with substantive protection against negligent conduct independent of the employer's obligations under its collective bargaining agreement, the Supreme Court in *Buell, supra*, 480 U.S. at 562, 107 S.Ct. at 1415, explained that "presumably a host of personal injuries suffered by railroad employees are caused by negligent practices and conditions that might have been cured or avoided by the timely invocation of the grievance machinery . . . But we have never considered that possibility a bar to an employee's bringing a FELA claim for personal injuries." *Id.*

In determining that silicosis was an injury under the FELA, the Supreme Court in *Urie v. Thompson*, 337 U.S. 163, 69 S.Ct. 1018, 93 L.Ed. 1282 (1949), recognized that nothing in the language[4] of the FELA or its legislative

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[4] The FELA, in pertinent part, provides: "Every common carrier by railroad while engaging in commerce between any of the several States . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such

history disclosed any express intent "to exclude from the Act's coverage any injury resulting 'in whole or in part from the negligence' of the [railroad] . . . On its face, every injury suffered by any employee while employed by reason of the carrier's negligence was made compensable." *Id.* at 181, 69 S.Ct. at 1030. Although courts are legitimately concerned that recognizing the cognizability of FELA claims for emotional injury could open the floodgates of litigation, the court in *Plaisance, supra*, 937 F.2d at 1010, noted that a person who suffers emotional injuries from the negligence of another should not be denied recovery simply because there is a danger of false claims, a possibility of liability for remote or unforeseeable consequences, or the possibility that the injuries were only temporary. "An emotional injury can be every bit as harmful, debilitating, and destructive of the quality of one's life as a physical injury." *Id.* at 1009.

I agree. Were the courts to preclude a right to recover because of the danger of false claims, the courts could, under that theory, shut down shop entirely. The job of the trial courts is, largely, to provide that fact-finding forum in which the bogus claim can be sifted out from the bona fide one. Since at the *nisi prius* level, the law is usually well-settled, and the facts are not, it is the latter, factual area upon which litigation generally finds its principal focus: evaluating evidence, to find the truth. It is a task that courts across the land perform daily, with a fair degree of success. Were the courts to shrink from that

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commerce . . . for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier. . . . " 45 U.S.C. § 51.

task and preclude all lawsuits, simply because some plaintiffs are perjurious, greedy, and malingering, justice would ultimately be denied to millions of the legitimately injured.

Courts have indeed allowed FELA claims based on work-related stress. In *McMillan v. Western Pacific Railroad Co.*, 54 Cal.2d 841, 9 Cal.Rptr. 361, 357 P.2d 449 (1960), the Supreme Court of California held that a train dispatcher who suffered a nervous collapse because of stressful working conditions stated a claim cognizable under the FELA. In *Barker v. Consolidated Rail Corporation*, No. 85-5304 slip op., 1986 WL 1203 (E.D.Pa. January 24, 1986), a case involving a train dispatcher who worked with Mr. Carlisle at Conrail, Judge Weiner held that a plaintiff stated a claim under the FELA where his heart attack was allegedly induced by excessive job stress. So too, in *Welby v. Consolidated Rail Corporation*, 671 F.Supp. 1015 (M.D.Pa.1987), Chief Judge Nealon held that plaintiff's claim that his heart attack was caused by improper and unsafe working conditions stated a claim under the FELA. *See also Yawn v. Southern Ry. Co.* 591 F.2d 312 (5th Cir.), *cert. denied*, 442 U.S. 934, 99 S.Ct. 2869, 61 L.Ed.2d 304 (1979) (employees' allegation that railroad failed to provide sufficient help and adequate time for employees to do their work stated a claim under the FELA).

Because I find, as did Judge McGlynn in *Kraus, supra*, 723 F.Supp. at 1089, that the law in this area is "less than clearly defined and in a stage of rapid evolution," *Id.*, and because both Third Circuit cases on the issue explicitly limited their holdings to the facts of each case, I conclude that the caselaw in this circuit does not mandate a physical contact to prove injury under the FELA. A plaintiff

does not have to prove physical impact resulting in physical injury to himself or the threat of physical contact caused by his placement in a zone of danger, in order to recover on a claim for negligent infliction of emotional distress under the FELA.

The objective-negligence standard used in *Plaisance* and adopted by Judge Hutton of this district in *Smolsky v. Consolidated Rail Corp.*, 780 F.Supp. 283, 290 (E.D.Pa.1991), after his own thorough review of the caselaw in this area, is the one I find to be appropriate in this situation. It permits an action for negligent infliction of emotional distress, where the plaintiff's claimed emotional injury resulted from a situation in which a reasonable person,[5] normally constituted, would not be able to cope adequately with the mental distress occasioned by the circumstances. *Plaisance*, 937 F.2d at 1010. In *Smolsky*, the plaintiff made a claim for negligent infliction of emotional distress under the FELA, alleging a campaign of systematic and abusive harassment, sexual and non-sexual, by her supervisor. The court held that, in order to recover on her claim, the plaintiff must prove all the traditional common-law elements of negligence: duty, breach, causation, and foreseeability. *Smolsky, supra* at 290; *see Adams v. CSX Transportation, Inc.*, 899 F.2d 536, 539 (6th Cir.1990). I find this test for a claim of negligent infliction of emotional distress more in accordance with

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[5] In this context, the reasonable railway employee, to which the courts must attribute "the appropriate daring and strength and quality of character," traits that generally belong to those who choose the railroad as a career. *Plaisance, supra*, 937 F.2d at 1011.

the evolving caselaw on emotional torts and the Supreme Court's broad construction of the FELA. Hence, my holding.

b. Application of the law to the facts of this case

In applying the negligence test to the facts of this case, I must determine whether plaintiff presented evidence at trial that was legally sufficient to get him to the jury on the question of negligent infliction of emotional distress. In so doing, I note that "where there is conflicting evidence which could lead to inconsistent conclusions, a judgment N.O.V. should not be granted." *Marian Bank v. International Harvester Credit Corp.*, 550 F.Supp. 456, 460 (E.D.Pa.1982), *aff'd*, 725 F.2d 668, 669 (3d Cir.1983).

In reviewing the evidence as to the negligence elements of duty, breach, causation, and foreseeability, on which I charged the jury, (N.T. May 20, 1991 at 157-162), it is clear from the outset that Carlisle has established duty on the part of Conrail, since the FELA imposes upon the defendant-employer a non-delegable duty to use reasonable care to furnish its employees with a safe place to work. *Sano v. Pennsylvania R.R.Co.*, 282 F.2d 936 (3d Cir.1960). Plaintiff claims that Conrail's breach of this duty, by requiring him to work under the strenuous conditions that he did, with the responsibilities he bore, for the length of time he did, caused his injury, and that Conrail knew or should have known that plaintiff's health was threatened by his work. As to these elements of breach, causation, and foreseeability, I must look to

plaintiff's trial evidence to determine whether, if believed by the jury, it would support a verdict in his favor.

After starting as a train dispatcher for Conrail in 1976, he moved up to supervising other train dispatchers and, by 1981, was responsible for all the train movements in and out of Washington D.C., Baltimore, Wilmington and Philadelphia. Some of these trains carried passengers, but most carried freight, and a great deal of that freight was hazardous material. From 1984 to 1987, Conrail consolidated jobs and reduced its workforce. It shortened tracks, closed control towers, and lessened the number of switches on the rails, forcing the dispatchers and Mr. Carlisle, their supervisor, to make more decisions as to which trains could move where.

Before the tower operators were eliminated by Conrail, they had served as "the eyes and ears" of the train dispatchers, since the dispatchers had no visual way to monitor the trains from the Control Center. (N.T. May 14, 1991 at 119). The tower operators were analogous to forward observers in the field artillery; they would see where a train was on the track and send that information back to the train dispatchers at the Control Center. Without the visual aid of the control towers, or any computerization that simulated train movements – such as lights moving on a remote control board – to locate and monitor the movement of the trains, the plaintiff and the other train dispatchers had to use third-hand information from SEPTA and Amtrak tower operators and data from a computer that gave only the last checkpoint the train had passed. In order to communicate this information among the train dispatchers, Mr. Carlisle, and others who worked in the Control Center, would shout it out to

whoever needed it, amidst telephones ringing and radios transmitting and receiving. Mr. Carlisle, along with the other train dispatchers, had to hold all this information in his memory. (N.T. May 14, 1991 at 120-121, 125, 127). Conrail gave him virtually no mnemonic assistance.

In 1988, Mr. Carlisle's already extensive job responsibilities shifted and increased. He was transferred to South Philadelphia operations in May of 1988, where he kept many of the train dispatching and supervisory responsibilities of his previous position. In addition, however, since Conrail had reduced the number of people working each shift from eleven to four, (N.T. May 14, 1991 at 100), Mr. Carlisle was given the responsibilities from what had previously been other jobs. He had to oversee several train yards in Philadelphia, enforce compliance with safety rules and perform the functions of a troubleshooter. As a troubleshooter, he had to go to the site of a train that was stopped for some reason, discover and remedy the problem – whether it be defective tracks, a bad switch, or vandalism – and perform various safety checks on the equipment, the trains, and the operating crews. (N.T. May 15, 1991 at 82). Mr. Carlisle testified that he had requested police protection many times, since the areas in which he had to check problems were often deserted train yards in dangerous areas, but that it was refused him. (N.T. May 15, 1991 at 83).

Beginning at the end of May, 1988, with the responsibilities of three jobs on his shoulders, Conrail required plaintiff to work fifteen-hour days, six to thirteen consecutive days at a time. For example, Mr. Carlisle went to work on August 7, 1988 at 6:00 p.m. He worked all through the night and then got off at 9:30 a.m., when he

would go home, try to spend some time with his wife and children, maybe get some sleep, and then be back at work at 6:00 p.m. again. This he did for eight consecutive days. In one two-week period, he worked in excess of 225 hours. During his time at work, Mr. Carlisle could not take any breaks for lunch or rest, (N.T. May 15, 1991 at 73, 112-117, 122, May 14, 1991 at 97). Plaintiff also introduced evidence to show that his supervisor verbally abused him at work and at home, calling in the middle of the night, and that during working hours, that supervisor had exhibited signs that he was drunk. (N.T. May 15, 1991 at 88-89, 92). As a train dispatcher, Mr. Carlisle was under pressure to achieve on-time performance for the trains, and he became more anxious when Conrail instructed him to ignore safety concerns, such as poor maintenance or malfunctioning equipment, which would have taken time to attend to. (N.T. May 15, 1991 at 30).

As his job responsibilities increased, his working conditions worsened, and his time on the job lengthened, the stress from work, plaintiff testified, was causing him mental and emotional pain that manifested itself physically. He felt severe fatigue and had headaches that would last all day. Because he had no appetite, he was losing weight – some 15-20 pounds, a significant amount for the not-so-hefty man the court observed at trial. He suffered from insomnia; during the few hours he did have off of work, he could not sleep. And one day, while driving to work, he blacked out at the wheel. His use of alcohol increased, as he tried to use it to get to sleep. When he did fall asleep, his wife would often find him sleepwalking, once with a lighted cigarette in his hand. (N.T. May 15, 1991 at 119-121, May 17, 1991 at 6, 9-10, 15).

Plaintiff fell into a major depression, and with it came a decrease in his awareness of what was going on around him, at home and at work. He feared that he was going to cause some serious damage to himself, to other people, or to property. (N.T. May 15, 1991 at 135, 139).

In addition to plaintiff's testimony that his working conditions were harming his health, Mr. Carlisle's treating psychiatrist and another psychiatrist, who provided expertise on the subject of stress, testified that he suffered from adjustment disorder that evolved into major depression, as well as from excessive use of alcohol – all, in reaction to anxiety and depression. In their opinion, his work caused his severe mental and physical health problems. (Videotape depositions of Dr. Lawrence Real and Dr. Paul Rosch). Even defendant's expert psychiatrist somewhat agreed; he testified that plaintiff did suffer from adjustment disorder caused, at least in part, by his work. (N.T. of Dr. Kenneth Kool, May 20, 1991 at 52-53).

I find that there was sufficient evidence for the jury to conclude that Conrail, in requiring Mr. Carlisle to work under conditions that were stressful and harmful in the extreme, breached its duty to provide him with a safe workplace. This is not the situation the Third Circuit faced in *Holliday, supra*, where the plaintiff suffered emotional harm from being put, for only a few days, in a position for which he felt unqualified. In the case at bar, Conrail exposed Mr. Carlisle to working conditions that were dangerous to his health for a protracted time. Cases have found that the FELA provides for recovery when an employer's negligence injures an employee through the employee's protracted exposure to harmful situations in the workplace, such as toxic industrial chemicals or

harassment by other employees. *See e.g. Smolsky v. Consolidated Rail Corp., supra,* 780 F.Supp. at 291 (recovery under the FELA for sexual and non-sexual harassment); *Urie v. Thompson, supra* 337 U.S. at 180-182, 69 S.Ct. at 1029-1031 (recovery under the FELA for exposure to asbestos); *Taylor v. Burlington Northern R. Co., supra,* 787 F.2d 1309 (9th Cir.1986) (recovery under the FELA for harassment and physical threats); *Teague v. National Railroad Passenger Corp.,* 708 F.Supp. 1344 (D.Mass.1989) (embarrassment and humiliation at work recognized as negligent infliction claim under the FELA).

This court sees no real distinction between a negligent infliction of emotional distress claim based on harassment at the workplace, and a work-related stress claim such as Mr. Carlisle's. Harassment and job stress are similar; both may result in emotional injuries to employees, and both are often within the control of the employer. In my view, plaintiff's evidence that Conrail's breach of its duty caused his emotional injuries, if believed by the jury, was sufficient to support a verdict in his favor.

In turning to the perplexing problem of foreseeability, a factor that concerned the courts in *Outten* and *Kraus*, Mr. Carlisle presented evidence that tended to show that Conrail could have foreseen that Mr. Carlisle's working conditions were dangerous to his health, and that the stress of his job would and did cause his emotional injuries, with physical manifestations. Mr. Carlisle testified that he complained to his supervisors about the stress of his long hours and overwhelming job responsibility. (N.T. May 15, 1991 at 133). Plaintiff also introduced into evidence the depositions of six other Conrail

train dispatchers who had all worked previously in plaintiff's same office. In the depositions, these witnesses testified that they had each suffered various medical illness ranging from heart attacks to nervous breakdowns, after being exposed to virtually the same working conditions as Mr. Carlisle. Mr. Carlisle, and the train dispatchers, in their depositions, testified that they told Conrail that unsafe working conditions and stress on the job had caused each of their illnesses. (N.T. May 15, 1991 at 12-23). This testimony was not admitted to prove that working conditions at Conrail caused the medical problems, *see infra*, but was admitted to prove notice to Conrail that the working conditions had become pervasively dangerous, or at least notice that the train dispatchers themselves believed that working conditions had caused their ailments.

Going to the issue of foreseeability, plaintiff read into evidence portions of two government reports, one made in 1974 and the other in 1987, on the medical and safety consequences associated with the stress of train dispatching, and plaintiff testified about the 1987 report. The 1974 report, a study of the job of train dispatcher, was not directed at any particular railroad, but it did find that the stress of their job caused negative medical consequences on the individual train dispatchers. Specific sources of stress noted in the report were the dependence on memory, inadequate staffing, the conflict between management's need for production and safety for the worker and the public, and the pressure for perfect performance, since a mistake could result in substantial injury. (N.T. May 17, 1991 at 61-65).

The report in 1987 was a Federal Railway Administration ("FRA") safety assessment of Conrail and its Philadelphia Office, where Mr. Carlisle worked. In particular, the report found that the dispatching workload was "excessive to the point that there was an appearance of having made decisions which were not well thought out." (N.T. May 17, 1991 at 67). The report noted its concerns that dispatchers are required to perform several other functions that are unrelated to the safe movement of trains and are forced to work in a necessarily disruptive environment, again, with phones ringing, radios blaring, and dispatchers shouting, necessary because there is no communications system between dispatching desks. The report found insufficient staff to provide relief for vacations, personal emergencies, or sickness, and it found that inefficient staffing decisions have forced dispatchers to work on rest days, and to forgo the familiarization trips required before a dispatcher is assigned to a particular track. (N.T. May 17, 1991 at 66-70). As to the conflict between production and safety, the report noted that "Too many middle and upper middle managers value quote 'production' end of quote over 'safety,' and fail to translate the organizational safety commitment into effective safety programs." (N.T. May 17, 1991 at 69).

Despite explicit recommendations to update the equipment used in the dispatcher's job, to reduce the workload per dispatcher, and to assure the availability of adequate dispatching personnel, (N.T. May 17, 1991 at 68), Mr. Carlisle testified that to his knowledge, he saw no change in these areas after the report came out; at least nothing was done in the Philadelphia office to alleviate or reduce the stressfulness of the train dispatcher's job.

(N.T. May 15, 1991 at 34). From the evidence presented by the plaintiff, the jury could have concluded that the 1974 report put Conrail on notice of the stressfulness of the train dispatcher's job, and of the medical problems caused by that stress. The 1987 report put Conrail specifically on notice that particular problems existed in the dispatcher's working conditions, creating a hazardous situation for the people who worked there. In addition, after Conrail received complaints by at least six other train dispatchers that the same conditions outlined in the 1987 report had caused their emotional and medical illnesses, the jury could have concluded that it was foreseeable to Conrail that working Mr. Carlisle for up to thirteen consecutive days, fifteen hours per day, under those stress-filled working conditions, would result in injury to Mr. Carlisle.

Plaintiff's evidence that Conrail negligently breached its duty to provide a safe workplace was legally sufficient to go to the jury. He presented evidence that tended to show that Conrail created hazardous working conditions, knew of their potentially harmful effects on plaintiff, and did nothing to alleviate them. Mr. Carlisle presented evidence that it was those stressful working conditions that caused his injury. Since the jury could reasonably have reached its verdict on the facts and the law, I shall deny defendant's motion for judgment notwithstanding the verdict.

II. *Motion for a New Trial*

Since granting the motion for a new trial acts to overturn a jury verdict, the court will not set aside the

jury's verdict unless "manifest injustice will result if the verdict is allowed to stand." *Emigh v. Consolidated Rail Corp.*, 710 F.Supp. 608, 609 (W.D.Pa.1989). A new trial should be granted only if there has been a miscarriage of justice. *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 61 S.Ct. 189, 85 L.Ed. 147 (1940). The authority to grant a new trial is reserved almost entirely to the discretion of the trial judge. *E.J. Stewart, Inc. v. Aitken Products, Inc.*, 607 F.Supp. 883, 893 (E.D.Pa.), *aff'd*, 779 F.2d 42 (3d Cir.1985). Defendant Conrail moves for a New Trial under Fed.R.Civ.P. 59 for several reasons. I will address each one in turn.

a. Defendant's claim that the verdict is contrary to law and contrary to the evidence

For the reasons set forth in my discussion on defendant's Motion for Judgment Notwithstanding the Verdict, finding plaintiff's evidence legally sufficient to support a verdict in his favor, I conclude that the verdict is not contrary to law. Since defendant does not discuss any specific evidence that would show that the jury verdict in favor of plaintiff is against the weight of the evidence, I will not grant the motion on that ground either.

b. Defendant's claim that the court erred in admitting the depositions and testimony of other train dispatchers

Defendant claims it was error for the court to admit the depositions of, and testimony concerning, six train dispatchers who had all worked previously in plaintiff's

same office. These witnesses testified that they each suffered various medical illness ranging from heart attacks to nervous breakdowns, after being exposed to the same working conditions as Mr. Carlisle. Their testimony, along with Mr. Carlisle's, was that they told Conrail that they had suffered these medical ailments because of the unsafe working conditions and stress on the job. Defendant claims this testimony was irrelevant and highly prejudicial.

On the contrary, I find that the testimony was relevant to Carlisle's notice of the probable dangerous effects that the train dispatcher's working conditions had on the person employed to do the job.[6] It tended to prove that at least Conrail knew that its train dispatchers linked working conditions with their medical problems. (N.T. May 15, 1991 at 10-12). The possibility that the evidence of other heart attacks, for example, might have suggested a causal link between employment as a Conrail train dispatcher, and Mr. Carlisle's injuries, was substantially lessened by a limiting instruction given by the court. (N.T. May 15, 1991 at 13-14). I instructed the jury:

> This evidence is not being admitted for proof of the matter asserted in the statement. That is to say, this evidence is not being admitted to prove

[6] The case at bar is unlike the situation in *Amatucci v. Delaware & Hudson Ry.*, 745 F.2d 180 (2d Cir.1984), cited by the defendant, where the trial judge elicited testimony on other engineers who had suffered heart attacks. There, the reversal seems to have turned on the fact that it was the judge, not counsel, who, over repeated objections and exceptions, persisted in asking a long series of questions, so that "the jury accordingly may have attached more weight to it." *Id.* at 184.

> that Joe Blow had a heart attack which he claims occurred on the job at Conrail. . . .
>
> It is being admitted for the very limited purpose of that so-called information having been transmitted to the powers that be at Conrail to put them on notice, as we say, to give them some inkling there might be some problem with the conditions on the premises.
>
> It is for that limited purpose of notice of whatever this so-called information – we know not whether it is true at this juncture – that that information was given to Conrail, to be a red flag to them that there might be some problem.

That evidence may be inadmissible on one theory does not preclude its admission entirely, should there be some other sound evidentiary theory of admission. Then, the inquiry turns rather to one of balancing. Any prejudice that Conrail claims to have suffered was outweighed by the probative value of the evidence on the issue of notice and foreseeability.[7] *See* Fed.R.Evid. 401 and 403.

Defendant further contends that it should have been allowed to show that the claims of four of these six testifying train dispatchers had been dismissed on summary judgment in another court proceeding. I disagree. While it is true that another court dismissed them, *see*

[7] Although not the explicitly the basis for my decision, the depositions of the train dispatchers and the 1974 and 1987 government reports, discussed *infra* could have been admitted under Fed.R.Evid. 702 as documents relied upon by plaintiff's expert, Dr. Rosch, in the formation of his opinion. Dr. Rosch testified that he did rely on these documents in order to reach his expert opinion.

Kraus v. Consolidated Rail Corp., supra, 723 F.Supp. 1073 (E.D.Pa.1989), evidence as to an injury is no less persuasive because a court has held that no cause of action exists to recover for that injury. The evidence was being offered solely to show that one District Judge had not found that a cause of action existed in those other cases. Their judicial disposition elsewhere was probative of nothing relevant to the fact-finder, but could have been highly prejudicial. I find now, as I did then, that under Fed.R.Evid. 403, this evidence would have unnecessarily confused the jury by, in essence, relitigating the other lawsuits, delving into "all the subtle distinguishing factual features and legal nuances between those and the case at bar," without offering anything substantial in probative value. (N.T. May 16, 1991 at 52-56). It would have been no more appropriate than for a court, in a products liability case, for example, after evidence of injuries and accidents had come forth – to prove notice to the manufacturer, to have permitted the manufacturer to bring in court records, or other evidence, showing that many of those accidents, upon coming to court, resulted in defense summary judgment victories and jury verdicts. The situation epitomizes the worthy purpose of Rule 403.

c. Defendant's claim that the court erred in admitting the 1974 and 1987 FRA Reports

Plaintiff introduced into evidence two studies of the Federal Railway Administration ("FRA"), one done in 1974, the other in 1987. As mentioned, these government documents, going to the issue of notice, were relevant. As for the hearsay aspect, they were admissible under

Fed.R.Evid. 803(8)(C), creating a hearsay exception for the admissibility of "factual findings resulting from an investigation made pursuant to authority granted by law." The Supreme Court, in *Beech Aircraft Corp. v. Rainey,* 488 U.S. 153, 109 S.Ct. 439, 102 L.Ed.2d 445 (1988), applied that subsection, holding that a government study's conclusions and opinions, as well as its factual observations could be admitted into evidence; the document there at issue was a Navy investigative report, which included an opinion on the most probable cause of a Navy airplane crash.

Defendant argues that since the 1974 study was so remote in time, it was irrelevant to Mr. Carlisle's 1988 working conditions. Defendant points out that Conrail was not even in existence then, much less a subject of the study, and plaintiff did not come to work for Conrail until 1976. I find Conrail's arguments unpersuasive. Again, the report was only admitted to prove notice. It is indeed true that Conrail did not exist in 1974, the Penn Central bankruptcy not yet then having been fully resolved. But the same tracks existed. The same trains, the same observation towers, the same roadbeds, the same railroad routes existed. The industry was well established. The problems in the industry did not magically appear or vanish or metamorphose with the creation of Conrail. To a certain extent, a railroad is a railroad is a railroad – a beautiful means of transportation, but not without thorns.

If a government study is done in 1974 which concludes that use of a certain product may be dangerous, and a company is formed in 1976, requiring its employees to use that potentially dangerous product, that company cannot ignore the already existing literature in the field,

with impunity. The 1974 study is certainly relevant to any action against the company for use of a dangerous product.

As to the 1987 study of actual Conrail Operations in Philadelphia, defendant claims that the study was inadmissible under 45 U.S.C. § 41, which prohibits the introduction into evidence of any portion of an accident report in civil lawsuits for damages. In particular, 45 U.S.C. § 41 provides that "[n]either the report required by section 38 of this title nor any report of the investigation provided for in section 40 of this title nor any part thereof shall be admitted as evidence or used for any purpose in any suit or action for damages growing out of any matter mentioned in said report or investigation." Defendant argues that the FRA's statement in the report, that one of the reasons why it was conducting the safety review was a series of accidents that occurred on the railroad, brings the 1987 safety study under the prohibition of 45 U.S.C. § 41. I find now, as I did at trial (N.T. May 16, 1991 at 46), that this generic study of safety concerns and accidents on the railroad was not the kind of report intended to be excluded from evidence under § 41. Section 41 precludes only the reports under Sections 38 and 40[8] from coming

[8] Section 38 provides that it is the duty of every common carrier to make to the Secretary of Transportation, a monthly report, under oath, "of all collisions, derailments, or other accidents resulting in death or injury to any person or damage to equipment or roadbed, arising from the operation of such railroad, which report shall state the nature and causes thereof and the circumstances connected therewith . . . " 45 U.S.C. § 38.

Section 40 provides that the "Secretary of Transportation shall have authority to investigate all collisions, derailments, or other accidents resulting in serious injury to person or to the property of a railroad occurring on the line of any common carrier . . . The Secretary, shall have authority to investigate such collisions, derailments, or other accidents aforesaid, and all the attending facts, conditions, and circumstances . . . and shall, when he deems it in the public interest, make reports of such investigations, stating the cause of accident, together with such recommendations as he deems proper. Such reports shall be made public in such manner as the Secretary deems proper." 45 U.S.C. § 40.

into evidence, these FRA reports not being under either section, the statute does not prohibit their admission. This safety report is distinguishable from an accident reconstruction report, where the government agency makes findings and conclusions about the causes or circumstances of one particular accident. The cases cited by defendant in its papers, *Protectus Alpha Navigation v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir.1985); *Minichello v. U.S. Industries, Inc.*, 756 F.2d 26 (6th Cir.1985); *Trochia v. Burlington Northern, Inc.*, 174 Mont. 83, 568 P.2d 558, *cert. denied*, 434 U.S. 1035, 98 S.Ct. 770, 54 L.Ed.2d 783 (1977), are not to the contrary, since they all involve the exclusion from evidence of government reports on one accident.

Finally, Defendant claims that plaintiff's reading of portions of the reports into evidence left the jury with a misleading impression of the complete report and prejudiced the defendant. Defendant did not object at trial on these grounds, and therefore, its objection is not preserved. In any event, defendant was not prevented from reading into evidence any other portion of the reports

that was relevant to the issue at hand; defendant simply chose not to.

d. Jury Instructions

Defendant claims that the court erred in not giving its jury instructions numbered 6, 7, 8, 9, 11, 16, and 17. The court did not give those jury instructions because they did not accurately characterize the law and were not supported by the evidence in the case. These instructions all dealt with defendant's contention that the law prohibits a cause of action under FELA for emotional injury caused by working conditions that were hazardous to plaintiff's health,[9] a subject discussed at probably too-great length, above. I did charge the jury quite fully in the language of *Holliday, supra*. For example:

> In order for Mr. Carlisle to maintain a claim for negligent infliction of emotional distress under the FELA, he must prove more than that he was placed for a few days in a position in some ways similar to his prior work assignment, but for which he was unqualified, and as a result, he suffered job-related stress and physical consequences attributable to his emotional state.
>
> Although an employee may feel that he received inadequate support help, was not permitted to take vacation days and worked in an understaffed office, and the employee claims to have suffered job-related stress injuries as a result of

[9] One exception is defendant's jury instruction no. 9 which charged on the issue of intentional infliction of emotional distress, a claim never plead or pursued by plaintiff.

> these employment conditions, such circumstances in and of themselves do not give rise to a claim under the FELA nor may Mr. Carlisle recover just because, in and of itself, he feared for the safety of others.
>
> If the heart of Mr. Carlisle's claim is that he did not like his new job of Train Master solely because it required him to work long hours and nights, then he has failed to state a claim under the FELA. While employees, in all walks of life, are placed in difficult, tense job situations, sometimes for extended periods, those placement decisions may be ordinary management decisions, and not of such a character that an employee's emotional reaction and related physical consequences to the placement, constitute an injury compensable under the FELA. The burden is on Mr. Carlisle to prove by a preponderance of the evidence that the emotional and psychological damages of which he complains, do exist and that they are a result of the negligence of Conrail. (N.T. May 20, 1991 at 156-157).

I find no errors in the other jury instructions given that would constitute a miscarriage of justice; all other aspects of the jury charge were in accordance with the law and the evidence in the case.

e. Statements of Plaintiff's Counsel

Defendant claims that plaintiff's counsel made two remarks that were so prejudicial that they constituted manifest injustice, mandating a new trial. One was during cross-examination of Mr. William Love, a Train Master who worked at times in 1988, in the South Philadelphia Yard with Mr. Carlisle. Plaintiff's counsel

asked, "Mr. Love, did you understand that when you had your heart attack, based on the role that your physicians indicated that your job may have played, that you may have had a cause of action against Conrail?" (N.T. May 20, 1991 at 20-21). The court then asked the witness whether he knew what a "cause of action" was, and he said he did not. The court then stated: "I remind the jury that just because a lawyer says somebody may have a cause of action does not necessarily mean that that is so. I guess lawyers think everybody has a cause of action against everybody. That's why court's are busy." (N.T. May 20, 1991 at 21). With this interjected caveat and quick pooh-poohing of counsel's improper ploy, with an intentional bit of mocking levity, the court cured whatever slight prejudice might have come from plaintiff's counsel's question. The jury was also instructed, twice – once in the opening charge, once in the closing – that the questions of counsel are not evidence; that is only to be found in the answers.

Lastly, defendant contends that when plaintiff's counsel allegedly broke the "Golden Rule" in summation, and that his misconduct so prejudiced the defendant as to call for a new trial. The use of the "Golden Rule" argument – that is, asking the jury to put themselves in the defendant's shoes – has been held by courts to be improper because it "encourages the jury to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence." *Spray-Rite Service Corp. v. Monsanto Co.*, 684 F.2d 1226, 1246 (7th Cir.1982), *aff'd on other grounds*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984).

In *Edwards v. City of Philadelphia*, 860 F.2d 568 (3d Cir.1988), the Third Circuit held, however, that the use of the "Golden Rule" argument is rendered harmless either by an immediate curative instruction or by a clear and complete jury instruction on the elements of the claim asserted and on the allocation of the burdens of proof. *Id.* at 574.

In the case at bar, plaintiff's counsel asked the jury, "If you were a defendant in which one of your employees was being accused of being a drunk and abusive, would you produce that employee?" (N.T. May 20, 1991 at 115). After objection and a sidebar conference with counsel, I immediately gave a curative instruction to the jury charging them that the "comment of counsel as to something to the effect that if you were the defendant in this case or whatever, you should disregard that entirely." (N.T. May 20, 1991 at 116). As to the second prong of *Edwards*, a clear and complete charge on the elements of plaintiff's claim and the burdens of proof was given in the jury instructions at the end of the trial, as well.

Having found no errors at trial that constitute such manifest injustice that a new trial is required, defendant's motion for a new trial will be denied.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 91-1926

JAMES E. GOTTSHALL,
Appellant,

v.

CONSOLIDATED RAIL CORPORATION,
Appellee.

Appeal from the United States
District Court for the
Eastern District of Pennsylvania
(D.C. Civil Action No. 89-03102)

SUR PETITION FOR REHEARING

Present: SLOVITER, *Chief Judge*, BECKER, STAPLETON, MANSMANN, GREENBURG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges.*

(Filed March 11, 1993)

The petition for rehearing filed by appellee Consolidated Rail Corporation in the above-entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for

rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied. Judge Greenberg and Judge Hutchinson would grant rehearing in banc. Judge Roth would grant rehearing for the reasons set forth in her dissent.